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ABSTRACT

This book is a collection of 26 addresses made at the 23rd annual convention of the National Organization on Legal Problems of Education. It discusses issues surrounding school law in elementary, secondary, and higher education in 1977 and before. Some of the topics covered include collective bargaining, employee layoff, sex discrimination and reverse discrimination, issues surrounding the First and Fourteenth Amendments, church-state relationship, desegregation, homosexual teachers, declining enrollment, search and seizure, bilingual education, finances, letters of recommendation, out-of-school activities of teachers, and school violence. (Author/LD)

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School Law Update—1977

Published Addresses from the 23rd Annual NOLPE Convention, held in San Francisco, California, November 9-11, 1977.

Edited by
M. A. McGhehey

NATIONAL ORGANIZATION ON LEGAL PROBLEMS OF EDUCATION
5401 S.W. Seventh Avenue
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Recent Court Decisions on Collective Bargaining in the Public Sector

Burton R. Shifman
Attorney at Law
Shifman & Goodman, P.C.
Southfield, Michigan

INTRODUCTION

This paper focuses on recent, significant court decisions in public sector collective bargaining under the following categories: the job security clause; the choice of instructional materials as the province of the school board under collective bargaining agreements; the effect of Open Meetings Acts on the board of education in collective bargaining negotiations: the discharge of teachers for striking in violation of the Michigan Public Employment Relations Act; the agency shop clause; and the legality of regional teachers' associations acting as collective bargaining agents for individual unit employees.

The Job Security Clause

In two cases decided on the same day, the New York Court of Appeals, the state's highest court, recently addressed the legal effect of job security clauses in collective bargaining agreements. The first case, *Burke v. Bowen*,[1] involved the clause in the context of an agreement between a city and a fire fighters' union. The second job security decision, *In re Board of Education of the Yonkers City School District v. Yonkers Federation of Teachers*,[2] considered teachers' collective bargaining.

Plaintiffs in *Burke* were 22 active Long Beach Fire Department members who sought injunctive relief compelling the city to reinstate 13 other fire fighters who were dismissed due to a severe economic crisis. Plaintiffs argued that the dismissal of the 13 fire fighters constituted a breach of the job security clause in the collective bargaining agreement and that the reduction in staff endangered the safety of the 22 remaining fire fighters. The job security clause read:

---

[1] 353 N.E.2d 567 (N.Y. 1976).
[2] 353 N.E.2d 569 (N.Y. 1976).

> All tours shall consist of a minimum of six (6) Fire Fighters (one Officer and five Fire Fighters) . . . It is agreed by and between the parties that the best interests of public safety as regards fire protection with the minimum complement of thirty-four (34) active Fire Fighters, shall be acceptable for the term of this agreement . . . Notwithstanding any provision herein, it is agreed that upon a re-evaluation as to minimum complement, that in no event shall the presently agreed upon minimum be readjusted downward. The specific intent of this provision is to assure public safety standards as well as minimum job protection for the Fire Fighters.[3]

The court of appeals unanimously held the plaintiffs not entitled to specific performance on the job security issue. Noting that the job security clause was not a mandatory condition of employment under New York law, the court opined that a job security clause for a reasonable period of time was a permissible subject for negotiation and did not violate public policy. Although the clause was explicit, the court, in exercising its equitable powers, balanced the competing interest and ruled that a city confronted with a serious financial crisis ought not be compelled to reinstate the dismissed employees. The court did state that the fire fighters might sue the city for damages for breach of contract.[4]

In the *Yonkers* case, the court of appeals unanimously reversed a lower court decision holding a job security clause in the teachers' collective bargaining agreement invalid and contrary to public policy. The court of appeals stated:

> A provision in a collective bargaining agreement guaranteeing public employees job security for a reasonable period of time is not prohibited by any statute or controlling decisional law and is not contrary to public policy. Hence, the Board of Education was free to bargain voluntarily about job security and was also, therefore, free to agree to arbitration of prospective disputes about job security.[5]

The job security clause was directed specifically at layoffs or dismissals due to financial emergencies (unlike the broader clause in *Burke*). The clause read:

---

[3] Burke v. Bowen, 353 N.E.2d 567, 568 (N.Y. 1976).

[4] *Id.* at 569.

[5] *In re* Board of Educ. of the Yonkers City Sch. Dist. v. Yonkers Federation of Teachers, 353 N.E.2d 569, 570 (N.Y. 1976).

> During the life of this contract no person in this bargaining unit shall be terminated due to budgetary reasons or abolition of programs but only for unsatisfactory job performance as provided for under the Tenure Law.[6]

The collective bargaining contract extended from July 1, 1974 to June 30, 1977. As a direct result of drastic budgetary cuts by the City of Yonkers in October, 1975, the Yonkers City School District, funded under the City of Yonkers budget, laid off approximately 50 persons, including some teachers. After the acting superintendent denied their grievance, the teachers demanded arbitration. At the school board's request, a lower state court stayed the arbitration on the grounds that the job security clause was contrary to public policy.

In reversing the lower court's stay, the court of appeals did not validate all collectively bargained public employment job security clauses, but applied the following factors in considering the validity of the clause at issue: the duration of the overall agreement; financial conditions at the time of negotiation; equality of the parties' bargaining power; and of primary importance, the specificity of the particular job security clause. The court placed weight on the specific mention in the clause that teachers were protected from abolition of their positions for budgetary reasons. In this regard, the court commented on the function of job security clauses:

> A job security provision ensures that, at least for the duration of the agreement, the employee need not fear being put out of a job. Such absence of fear may be critical to the maintenance and efficiency of public employment, just as the fear of inability to meet its debts may destroy the credit of the municipality. A job security clause is useless if the public employer is free to disregard it when it is needed.[7]

Thus, *Burke* and *Yonkers* hold that under certain circumstances a job security clause may be upheld against claims that such clauses contravene public policy. Apart from the circumstantial factors which a court might assess in passing on the validity of these clauses, the important lesson to be drawn from these cases concerns drafting. Explicit and unambiguous language, with specific reference to circumstances to which the clause pertains, will be much more likely to withstand challenge than a broadly drafted, ambiguous clause. Additionally, the presence or absence of arbitration provisions will have an effect on the procedural aspects of legal disputes involving these clauses.

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[6] *Id.* at 571.
[7] *Id.* at 573.

Unanswered by these cases is the question of the apparent conflict between provisions of state teacher tenure laws permitting layoffs of teachers, including tenured teachers, for financial reasons. [*e.g.*, Michigan Teacher Tenure Act, MCL 388.1202, MSA 15.1919(602)]. Also, many states, Michigan and Ohio among them, prohibit schools from operating at a deficit. In states with such statutory provisions, it is certainly arguable that job security clauses should not be given full effect when the discharge or layoff is due to economic circumstances. In this area, as in many others, a question remains as to the effect of a collective bargaining agreement provision which conflicts with a state statute dealing with the same subject.

CHOICE OF INSTRUCTIONAL MATERIALS

In *Cary v. Board of Education of the Adams-Arapahoe School District, 28-J Aurora, Colorado,*[8] the court found that the plaintiff teachers, through their representatives, had bargained away their first amendment right to select eleventh and twelfth grade elective course material.

In January, 1975, the board created a committee of teachers, students, parents and school board members to review course material. The committee met publicly and after soliciting comments, submitted its report on Janurary 6, 1976. At a public meeting of the board on January 12, 1976, 1,275 textbooks were approved for high school use and 10 books were disapproved.[9]

The ten disapproved books were listed previously by plaintiff teachers for use in their courses. The parties stipulated that these ten books were not obscene,[10] did not advocate any particular philosophy, and that the board's disapproval was not an abuse of discretion.

The following clauses of the collective bargaining contract governed curriculum and selection of course material:

> Academic Freedom—The parties seek to educate young people in the democratic tradition, to foster a recognition of individual freedom and social responsibility, to inspire meaningful awareness of and respect for the constitution and the Bill of Rights.

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[8] 427 F. Supp. 945 (D. Colo. 1977). This case was highlighted in *Selection of Instructional Materials Board's Right in Colorado Case*, 12 NOLPE Notes No. 6, at 1-2 (June, 1977).

[9] *A Clockwork Orange; The Exorcist; The Reincarnation of Peter Proud; New American Poetry; Starting From San Francisco; The Yage Letters; Coney Island of the Mind; Kaddish and Other Poems; Lunch Poems;* and *Rosemary's Baby*. Cary v. Board of Educ. of the Adams-Arapahoe Sch. Dist., 28-J Aurora, Colo., 427 F. Supp. 945, 947 (D. Colo. 1977).

[10] Colo. Rev. Stat. §22-32-110 (1973) states: (1) In addition to any other power granted to a board of education of a school district by law, each board of education of a school district shall have the following specific powers to be exercised in its judgment: (r) to exclude from each school and school library any books . . . which, in the judgment of the board, are of immoral or pernicious nature.

> Freedom of individual conscience, association and expression will be encouraged and fairness and procedures will be observed both to safeguard legitimate interests of the schools and to exhibit by appropriate examples the basic objectives of a democratic society as set forth in the Constitution of the United States and the State of Colorado.
>
> The final responsibility in the determination of the above rests with the Board.[11]

Further, Article V, "Board Rights", of the collective bargaining agreement stated the board could "[d]etermine the processes, techniques, methods and means of teaching any and all subjects."

The court set forth the free speech issue thusly:

> [W]hether the constitutionally-recognized right to academic freedom has any applicability in the context of public high school.[12]

On the facts of the case, the court decided this issue in favor of the teachers by holding that "it would be inappropriate to conclude that academic freedom is required only in colleges and universities."[13]

The court qualified its holding somewhat:

> I do not hold that a school board has any obligation to create an open environment in any school. It is enough to conclude that having granted both teachers and students the freedom to explore contemporary literature in these high school classes, the school board may not now impose its value judgment on the literature they choose to consider.[14]

Additionally, the court made it clear that teachers, as employees, were subject to board controls over the educational program, and that limitations on the exercise of academic freedom "are required to achieve the purpose of academic freedom."[15]

The court then considered the effect of the collective bargaining provisions which it characterized as the "central fact" in the case and concluded:

---

[11] Cary v. Board of Educ. of the Adams-Arapahoe Sch. Dist., 28-J Aurora, Colo., 427 F. Supp. 945, 948 (D. Colo. 1977). Colo. Rev. Stat. §22-32-109(1) (1973) declares that each school board "shall have and perform the following specific duties: (t) to determine the educational programs to be carried on in the schools of the district, and to prescribe the textbooks for any course of instruction or study in such programs." Assuming this statute was not overlooked, it is of interest that the *Cary* opinion does not mention this statute nor consider it relevant in its analysis.

[12] Cary v. Board of Educ. of the Adams-Arapahoe Sch. Dist., 28-J Aurora, Colo., 427 F. Supp. 945, 951 (D. Colo. 1977).

[13] *Id.* at 953.

[14] *Id.*

[15] *Id.* at 955.

> Through the AEA [Aurora Education Association] the teachers in the defendant school district have elected to surrender their individual freedom of professionalism for the security of protectionism by collective action and a group contract. In so doing, they have voluntarily submitted themselves to the employer-employee model of the teacher's relationship to the school board for everything which is within the scope of the contract and that includes the authority to control communication through the assignment of reading material.
>
> But for the bargained agreement, the plaintiffs would prevail here....
>
> ...Thus, a teacher may bargain away the freedom to communicate in her official role....
>
> ...In full context, that contract says that while the school board agrees to respect their professional views, in the event of a conflict, the Aurora teachers will accept the directions of their employer. Plaintiffs are bound by that commitment and they may not now seek to avoid it by calling upon a constitutional freedom to act independently and individually.[16]

Thus, *Cary* indicates that limited first amendment academic freedoms do exist in high school situations, at least for federal jurisdictional purposes. The *Cary* opinion does not, however, directly address the apparent conflict between such a right and a state statute[17] conferring upon local boards of education the exclusive and unilateral right to select instructional materials. The *Cary* case characterizes the collective bargaining agreement as the "central fact," while ignoring the state statute vesting course material selection solely in the board.[18] Thus, the case implies that, disregarding the collective bargaining agreement, the teachers' limited first amendment freedom to teach would prevail over the statute. For example, the Michigan School Code of 1976, §1422(1) states:

> [T]he board of each school district shall select, approve, and purchase the textbooks to be used by the pupils of the schools on the subjects taught in the district.[19]

When directly balanced against this statutory delegation of state legislative control to local boards, the academic freedom right faces a stiffer challenge.

A related case, distinguished by the court of appeals for the Second Circuit in *President's Council, District 25 v. Community School Board No. 25*,[20] involved a New York statute in which the local community school board was given the power and duty in the selection of instructional materials (as in *Cary*). The court stated:

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[16] *Id.* at 955-956.
[17] *See supra* note 11.
[18] *Id.*
[19] Mich. Comp. L. §380.1422 (1976).
[20] 457 F.2d 289 (2d Cir. 1972), *cert. denied*, 409 U.S. 998 (1972).

> [W]e do not consider it appropriate for this Court to review either the wisdom or the efficacy of the determination of the Board. Our function is purely one of constitutional adjudication of the facts and the record before us: has the Board transgressed the first amendment rights of the plaintiff teachers, parents, librarian and children? In its most recent pronouncement on the subject, the Supreme Court has stated: "By and large, public education in our nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems which do not directly and sharply implicate basic constitutional values." After a careful review of the record before us and the precedents we find no impingement upon any basic constitutional values. Since we are dealing not with the public bookstores but with a library within a public junior high school, evidently some authorized person or body has to make a determination as to what the libary collection will be. It is predictable that no matter what choice of books may be made by whatever segment of academe, some other person or group may well dissent. The ensuing shouts of book-burning, witch-hunting and violation of academic freedom hardly elevate this intramural strife to first amendment constitutional proportions. If it did, there would be a constant intrusion of the judiciary into the internal affairs of the school. Academic freedom is scarcely fostered by the intrusion of three or even nine Federal jurists, making curriculum or library choices for the community of scholars.[21]

The question arises whether a board in a state such as Michigan may make the selection of instructional materials a subject of collective bargaining (there is no statutory prohibition in Michigan against so doing). The decision in *Fire Fighters Union v. City of Mt. Clemens*,[22] holding that a city charter provision governing fire fighters' pension and retirement benefits did not prevent the setting of such benefits through the collective bargaining process, is in accord with similar decisions in other jurisdictions. Accordingly, it is arguable that if a school board bargains away its absolute right to select instructional materials, it may not later rely on the statute to restrict the academic freedom of those to whom it has given the right. The ability to bargain away statutory rights is not always clear. While the doctrine that negotiated contracts take precedent over local charters or similar documents is clearly established in many jurisdictions, obviously, the federal court in Colorado believes that teachers can bargain away a limited constitutional right of freedom to teach. Therefore, the board of education would, in that court's view, be able to contract away its right to select textbooks.

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[21] *Id.* 457 F.2d at 291-292.

[22] 228 N.W.2d 500 (Mich. Ct. App. 1975).

OPEN MEETINGS ACT AND COLLECTIVE BARGAINING NEGOTIATIONS

The Supreme Court of the United States, in *City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Commission*,[23] held that a non-union, tenured teacher had a first amendment right to address the board of education at a public meeting despite the pendency of collective bargaining negotiations. The court held that since the non-union teacher spoke both as a teacher and a concerned citizen, it was an unlawful prior restraint on the freedom of speech for the Wisconsin Employment Relations Commission (WERC) to prohibit the board from allowing non-union employees to speak at any meetings during which collective bargaining matters might be discussed. Reaffirming the principle that teachers cannot be "compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work,"[24] the Court noted that the particular meetings, which are "true bargaining sessions" under Wisconsin law, are conducted privately.[25] The Court recognized as a general matter that:

> [t]he participation in public discussion of public business cannot be confined to one category of interested individuals [other than confining meetings to specified subject matters]. To permit one side of a debatable public question to have a monopoly expressing its views to the government is the antithesis of constitutional guarantees.[26]

and that "restraining teacher's expressions to the Board on matters involving the operation of the schools would seriously impair the Board's ability to govern the district."[27]

Accordingly, neither the union nor WERC could legitimately prohibit germane commentary by a non-union teacher on board business.

In *Jefferson County Board of Education v. The Courier-Journal*,[28] the court considered an action brought by a newspaper against a board which allegedly held closed sessions in violation of the Kentucky Open Meetings Act. The court of appeals held that the board did not comply with the requirement of mandatory notice of closed sessions by announcing a blanket resolution that it would go into closed session the fourth Monday of each month to discharge its work.[29] The court required a prior notice of each closed session indicating the general nature of the business to be discussed and setting forth one of the statutorily permissible reasons for meeting in secret.[30] The board stated that the meeting at issue in *Jefferson* was closed in order to "discuss property and negotiations."[31] At the closed session, the Associate Superintendent of Personnel reported to the board on contract negotiations between the board and two associations which represented the teachers. He further reported on the proposed merger of the two teacher associations and recommended that negotiations take place. Other topics discussed concerned possible sale of a public television network and the sale of a school building site. The trial court held all final action taken at the improperly closed meeting void.

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[23] 50 L. Ed. 2d 376 (1976).
[24] *Id.* at 384.
[25] *Id.* n. 6.
[26] *Id.* at 385.
[27] *Id.* at 386.
[28] 551 S.W.2d 25 (Ky. App. 1977).

With respect to the collective bargaining negotiations, which under the Kentucky Act are a proper basis for closed sessions, the court of appeals ruled that this exception

> does not embrace everything tangential to the topic.... We do not believe that the legislature intended "reports" or status briefings on labor negotiations to be held in privacy and that is exactly what the record herein indicates, namely, that the Associate Superintendent... reported on the status of a proposed contract between the Board and two teachers associations and further "recommended to the Board that negotiations should take place." It is at once evident that [the School Board] was not in the process of negotiations and that that segment of the meeting was not an exception as contemplated by [the statute]. On the other hand, whenever a public agency is formulating its demands or position preparatory to collective bargaining negotiations, either by way of deliberations or instructions to its advocates, then we believe these types of sessions are within the purview of [the statute].[32]

The Kentucky Act, like the majority of the "Sunshine Acts" adopted by 47 states, delineates specific situations in which the board may properly convene a closed session. Collective bargaining negotiations and deliberations are typically one of the situations. Section 8(c) of the Michigan Open Meetings Act states that:

> a public body may meet in closed session only for the following purposes: (c) for strategy and negotiation sessions connected with the negotiation of a collective bargaining agreement when either negotiating party requests a closed hearing.[33]

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[29] *Id.* at 27.

[30] *Id.* at 29.

[31] *Id.* at 27.

[32] *Id.* at 28-29.

[33] Mich. Comp. L. §15.261, *et. seq.* (Supp. 1977).

Nevertheless, the *Jefferson County* decision indicates that courts will require boards to adhere scrupulously to statutory procedures for closing a meeting even if a valid exception is applicable.

The Attorney General of Michigan has rendered two instructive opinions on the applicability of the Michigan Open Meetings Act. An opinion dated March 8, 1977 stated that a public body may establish and limit by rule the length of time a person may address the public body at a public meeting, may restrict public participation to a certain part of the agenda, and may require speaker identification prior to speaking.[34] A September 13, 1977 opinion concluded that a board of education may not:

> 1. Deny a person the right to address a meeting of the board on the sole ground that that person is a representative of an organization of board employees;
>
> 2. Limit the subject and issues that certain persons may cover in the course of addressing the meeting;
>
> 3. Require persons to exhaust administrative remedies before addressing issues at a public meeting; nor
>
> 4. Prohibit a person from addressing it on grounds the matter to be addressed is or might be the subject to a closed meeting.[35]

The Michigan School Code of 1955 specifically permitted a school board to hold executive sessions but no "final action" could be taken at such a session.[36] In *Dryden v. Marcellus Community Schools Board of Education*[37] the Supreme Court of Michigan held that in the context of terminating a probationary teacher, "final action" necessitated a termination vote at a public session but did not require public announcement of the supporting reasons which were reviewed by the board at an executive session.[38] The Michigan School Code of 1976 permits a board to hold closed sessions only as authorized by the Open Meetings Act. Section 8 of the Act permits a board to meet in closed session "(a) to consider the dismissal . . . or to hear complaints or charges brought against, a public officer, employee, staff member . . . when the named person requests a closed hearing."[39] Although the option to request closed hearings rests with the "named person", §3 (2) of the Act requires that all board decisions be made in an open meeting.[40] *Dryden* reconciles the apparent conflict by mandating that the actual termination be by vote at an open meeting, but allowing the reasons therefor to remain secret.

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[34] OAG No. 5183 (March 8, 1977).

[35] OAG No. 5218 (Sept. 13, 1977).

[36] Mich. Comp. L. §340.561, *as amended by* Mich. Comp. L. §380.1201(2) (Supp. 1977).

[37] 401 Mich. 76 (1977).

[38] *Id.* at 78-79.

[39] Mich. Comp. L. §15.268 (Supp. 1977).

[40] *Id.* §15.262

TEACHER DISCHARGE FOR VIOLATION OF THE MICHIGAN PUBLIC EMPLOYMENT RELATIONS ACT

The Supreme Court of Michigan, in *Rockwell v. Board of Education of the School District of Crestwood*,[41] ruled 4-3 that any teacher, whether tenured or not, who strikes in violation of the Michigan Public Employment Relations Act (PERA)[42] may be disciplined without prior hearing. The facts and procedural history of this case are complex. After bitter bargaining disputes, the Crestwood teachers who had been without a contract since August, 1974, did not report to work on September 3, 1974, the first day of the school year. A lawsuit filed by parents on September 30, 1974 culminated in the issuance of an injuction directing the teachers to return to classes. The teachers did not report to work and in December, 1974, classes were suspended. The school board then resolved that those teachers who failed to either report to work or submit a letter of resignation by December 27, 1974, would be dismissed. Thirty-eight (38) teachers reported, one resigned and the remaining one hundred eighty-four (184) were dismissed by resolution of the school board on December 30, 1974.

Prior to the December 30, 1974 board resolution, the teachers' union had filed unfair labor practice charges with the Michigan Employment Relations Commission (MERC).[43] Subsequently, the union filed amended charges alleging that the board had not bargained in good faith and was seeking to destroy the union. On January 6, 1975, the teachers sought individual hearings on their discharges pursuant to section 6 of PERA.[44] On January 10, 1975, a panel of the Wayne County Circuit Court set aside the board resolution of December 30, and ordered reinstatement of the teachers. The court of appeals affirmed but the Supreme Court reversed.

Central to the Supreme Court decision is the difference between the PERA and the Teacher Tenure Act. The former is the governing law for public employee labor relations; the latter controls individual employment situations and does not address labor disputes.[45] PERA defines "strike" as follows:

---

[41] 393 Mich. 515, 227 N.W.2d 736 (1975), *appeal dismissed sub nom.* Crestwood Educ. Ass'n v. Rockwell, 427 U.S. 901 (1976), *motion to set aside judgment denied*, 339 Mich. 1045 (1977).

[42] Mich. Comp. L. §423.201, *et. seq.* (1975).

[43] Mich. Comp. L. §423.1, *et seq.* (1975). MERC Labor Opinions may be ordered from: Opinions Press, P.O. Box 1095, Big Rapids, Mich. 49307.

[44] Mich. Comp. L. §423.206 (1975).

[45] Rockwell v. Crestwood Sch. Dist. Bd. of Educ., 393 Mich. 616, 628-630 (1975).

> As used in this Act: (a) "strike" means the concerted failure to report for duty, the wilful absence from one's position, the stoppage of work, or the abstinence in whole or in part from the full, faithful and proper performance of the duties of employment, for the purpose of inducing, influencing or coercing a change in the conditions, or compensation, or the rights, privileges or obligations of employment.

Section 6 of PERA authorizes the employer, without a prior hearing, to terminate employment of or otherwise discipline employees who strike in violation of PERA. Discharge or demotion under the Teacher Tenure Act may not be accomplished without a full, prior, evidentiary hearing but the Michigan Supreme Court reasoned:

> [T]o the extent there is conflict—and manifestly there is conflict as the Teachers Tenure Act provides that discipline may be imposed only after charges, notice, hearing and determination, while the PERA contemplates imposition of discipline before a determination of whether the Act has been violated and provides for a hearing only on request of the employee after the imposition of discipline—the PERA is to govern "[n]otwithstanding the provisions of any other law."[47]

Having determined that the PERA is the governing law, the court then ruled that teachers' due process rights were not violated by the post-disciplinary procedure provided in §6:

> When public employees strike, the public employer must, like a private employer, be able to hire substitute employees so that the public business is not interrupted. In order to hire competent replacements, it may be necessary for the public employer to offer permanent employment and thus displace strikers. Where essential services have been suspended, the hiring of replacements often cannot await time-consuming adjudicatory processes.
>
> The possibility of removal of a non-striker is minimized when, as here, the school board gives each striking teacher personal notice of the opportunity to return to the classroom before disciplinary action is taken. While on strike, a teacher receives no compensation; striking teachers do not suffer additional interim financial deprivation when disciplined.[48]

The court also held that the discharged teachers would be entitled to reinstatement regardless of the illegal strike if MERC determined that the school board committed unfair labor practices as alleged by the union. This result parallels the PERA statutory scheme under which an

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[46] Mich. Comp. L. §423.201 (1975).

[47] Rockwell v. Crestwood Sch. Dist. Bd. of Educ., 227 N.W.2d 736, 741 (Mich. 1975).

[48] *Id.* at 634-635.

employer's unfair labor practice is a defense in a PERA §6 disciplinary proceeding.

In determining whether an unfair labor practice exists, a court must examine the actions of each side during the course of negotiations. The PERA, itself, establishes certain standards in this regard. §15 provides:

> [T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, the execution of a written contract . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession.[49]

As to "good faith", the Supreme Court of Michigan stated in *Detroit Police Officers Association v. City of Detroit*:[50]

> [T]he Courts look to overall conduct of a party to determine if it is actively engaged in the bargaining process with an open mind and a sincere desire to reach an agreement . . . In essence the requirements (Sic) of good faith bargaining is simply that the parties manifest such an attitude and conduct that will be conducive to reaching an agreement.

MERC has held that a strike constitutes neither a *per se* refusal to bargain nor an unfair labor practice as delineated in §10 of PERA.[51] While some states expressly designate a strike as a prohibited or unfair labor practice (*e.g.*, Florida, Kansas, Maine, Minnesota,New Hampshire, Pennsylvania, Vermont, Wisconsin),[52] Michigan does not. The Commission ruled in *Warren Consolidated* that "while a public sector strike does not constitute a *per se* refusal to bargain [*citing Lamphere School District v. Lamphere Federation of Teachers*, 67 Mich. App. 482, 241 N.W. 2d 257 (1976)], such a strike activity and the totality of conduct] can be evidentiary of bad faith bargaining."[53] MERC found that the union's rejection of suggested fact-finding, recourse to an illegal strike and other similar activity amounted to a refusal to bargain in good faith, and it

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49. Mich. Comp. L. §423.215 (1975).

50. 214 N.W.2d 803, 808 (1974).

51. *In re* Warren Educ. Ass'n and Warren Consol. Sch. Bd. of Educ., No. CU73 I-5 (MERC Aug. 31, 1977), *decision and order on reconsideration*.

52. Fla. Stat. Ann. §447.501(2)(3) (West Supp. 1976); Kansas Stat. §75-4333(c)(5) (1977); Me. Rev. Stat. tit. 26, ch. 9-A, §964(2)(c)(3) (1964); Minn. Stat. Ann. §179.68(3)(11) (West Supp. 1977); N. H. Rev. Stat. Ann. §273-A:5(II)(e) (Supp. 1975); Pa. Stat. Ann. tit. 43, §1201(b)(6)(7) (Purdon Supp. 1977); Vt. Stat. Ann. tit. 3, ch. 27, §962(5) (Supp. 1977); Wis. Stat. Ann. §111.84(2)(e) (West 1974).

53. *In re* Warren Educ. Ass'n and Warren Consol. Schs. Bd. of Educ. No. CU73 I-5, at 7 (MERC Aug. 31, 1977), *decision and order on reconsideration*.

ordered the union to bargain in good faith with the district and to inform MERC within twenty (20) days of the steps taken by it to comply with the Commission's order.[54]

Recognizing that under *Rockwell* compulsory arbitration of teacher disputes is unavailable under PERA, MERC, in effect, filled in this gap by requiring the parties to bargain in good faith and seek mediation and fact-finding rather than strike in violation of PERA.

Finally, it should be noted that state law will, in the main part, define and delimit the due process rights of teachers in this general area. In *Lake Michigan Federation of Teachers v. Lake Michigan Community College* ,[55] the court of appeals agreed that under *Rockwell* a public employee strike is illegal[56] and reversed a district court decision which held that the discharge of a teacher for illegally striking post-disciplinary hearing procedures of §6 of PERA both violated due process requirements. The court of appeals stated that if "PERA instills any expectation in public employees, it is that they will be terminated or otherwise disciplined according to specified procedures if they go on strike."[57]

Further, the court rejected the contention that the College Board of Trustees would be inherently biased in conducting the post-discipline hearing, since under the PERA the only issue at such a hearing is whether or not a particular employee in fact did strike: "The Board's sole objective in conducting the PERA hearings is to ensure innocent teachers were not mistakenly identified as strikers, and there is nothing in the record to indicate that the Board will not perform this duty fairly."[58]

Likewise, in *Hortonville Joint School District No. 1 v. Hortonville Education Association*, [59] the United States Supreme Court held, in a 6-3 decision, that board action in terminating teachers' employment for striking illegally under Wisconsin law did not violate due process guarantees. The Court declared:

> State law vests the governmental, or policymaking, function exclusively in the School Board and the State has two interests in keeping it there. First, the Board is the body with overall responsibility for the governance of the school district; it must cope with the myriad day-to-day problems of a modern public school system including the severe consequences of a teachers' strike; by virtue of electing them the constituents have declared the Board members qualified to deal with these problems, and they are accountable to the voters for the manner in which they

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[54] *Id.* at 9-11.
[55] 518 F.2d 1091 (6th Cir. 1975), *cert. denied*, 427 U.S. 904 (1976).
[56] *Id.* 518 F.2d at 1098.
[57] *Id.* at 1095.
[58] *Id.* at 1099.
[59] 426 U.S. 482 (1976).

> perform. Second, the state legislature has given to the Board the power to employ and dismiss teachers, as part of the balance it has struck in the area of municipal labor relations; altering those statutory powers as a matter of federal due process clearly changes that balance. Permitting the Board to make the decision at issue here preserves its control over school district affairs, leaves the balance of power in labor relations where the state legislature struck it, and assures that the decision whether to dismiss the teachers will be made by the body responsible for that decision under state law.[60]

THE AGENCY SHOP CLAUSE

Abood v. Detroit Board of Education[61] upheld the validity of an agency shop clause in a collective bargaining agreement between the school board and the teacher's union. Further, the high court, in essence, stated that union security principles in the public and private sector are indistinguishable.

In *Abood*, the collective bargaining agreement contained an "agency shop" clause authorized by Michigan law.[62] The clause required each teacher who did not become a union member within sixty (60) days of hire to pay the union a service charge equal to the regular dues charged union members. Teachers were not required to join the union or otherwise participate in union activities but any teacher who did not pay the service charge could be discharged. Plaintiffs argued that the clause deprived non-union members (who nonetheless comprised members of the bargaining unit) of federal constitutional rights but this argument was rejected by the Court.

> [T]he judgment clearly made [in prior cases] is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress. "The furtherance of the common clause leaves some leeway for the leadership of the group. As long as they act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy".[63]

The majority opinion in *Abood* did, however, conclude that non-union members who objected to the expenditure of union funds in support of certain political activities were entitled to have their objections registered and could receive a refund of charges paid on a proportionate basis.

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[60] *Id.* at 495-496.

[61] 92 L. Ed.2d 261 (1977).

[62] Mich. Stat. Ann. §17.455 (10)(1)(c) (Rev. Vol. 1975).

[63] Abood v. Detroit Bd. of Educ., 92 L. Ed.2d 261, 276 (1977).

With respect to *what* activities may be supported by non-union member service fees, the Court "drew" a gray line "between collective bargaining activities for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited."[64] The Court returned the case to the Michigan Court of Appeals for development of a factual record. (*Abood* came to the Supreme Court following summary judgment in the circuit court which was affirmed by the court of appeals.) The court stated that if plaintiffs were able to prove their allegations that the service fee charges were indeed expended to a substantial degree for non-collective bargaining purposes, "the objective [of any remedy] must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the union's ability to require every employee to contribute to the cause of collective bargaining activities."[65] In shedding some light on how dissenters from non-collective bargaining union activities could limit expenditure of their service fee funds, the Court pointed to the internal union remedy previously adopted by the Detroit teachers' union.[66] That procedure provides that:

> [A] dissenting employee may protest at the beginning of each school year the expenditure of any part of its agency-shop fee for "activities or causes of a political nature or involving controversial issues of public importance only incidentally related to wages, hours, and conditions of employment." The employee is then entitled to a pro-rata refund of his service charge in accordance with the calculation of the portion of total union expenses for the specified purposes. The calculation is made in the first instance by the union, but is subject to review by an impartial board.[67]

After the Supreme Court returned *Abood* to the Michigan Court of Appeals, that court in turn sent the case back for trial to the Wayne County Circuit Court.[68] In the circuit court, plaintiffs filed a motion for an order permitting the escrow of all "service-fee" deductions made by the union, pending proof by the union of the amount of the service fee used only for collective bargaining purposes. The court denied plaintiff's motion. The existence of the internal rebate plan, and the voluntary tendering by the union to dissenting non-union members, who utilized the rebate procedure, of a rebate amount covering estimated political and ideological

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64. *Id.* at 285.
65. *Id.*
66. *Id.* at 287 n. 41
67. *Id.*
68. Order Nos. 19465, 19523 (July 14, 1977).

purposes for the 1977-78 school year (based on 1976-77 experience) impressed the trial court in its denial of plaintiff's escrow motion.[69]

While it is clear, under *Abood*, that objecting non-union teachers may recover that portion of their service fees used for non-collective bargaining activities, it is unclear as to *where* the line is to be drawn so as to calculate the refund. The decision is thus subject to criticism in that it provides little practical guidance toward resolving actual disputes which, in the future, must be settled on a case-by-case factual basis.

REGIONAL TEACHERS' ASSOCIATION AS BARGAINING AGENTS

The Board of Education of the Kalkaska Public Schools refused to engage in collective bargaining with the Northern Michigan Education Association (NMEA) which was chosen by the Kalkaska teachers as their collective bargaining representative at a representation election ordered by MERC.[70] Following the May 20, 1977 election, MERC certified the NMEA (an affiliate of the Michigan Education Association) as the collective bargaining representative for all certified teaching personnel of the Kalkaska Public Schools. NMEA negotiators requested the Board to commence negotiations on June 9 and the Board refused to negotiate with the NMEA. A resolution of the Kalkaska Board stated:

> The Kalkaska Board of Education agrees to negotiate with teachers of the Kalkaska Public Schools, but refuses to negotiate with teachers from other school districts who are a part of the NMEA [Executive Council] and have asserted their right to ratify an agreement which we may subsequently reach through collective bargaining.

On June 30, 1977, the Board unilaterally adopted a new salary schedule effective for the 1977-78 school year; NMEA demanded to negotiate concerning the salary schedule, but the Board refused to bargain. Accordingly, the NMEA filed unfair labor practice charges.

The Board's central position was that the NMEA constituted an improper collective bargaining agent for the Kalkaska Public School Teachers. The Board pointed out that internal union procedures included secret ballot ratification of locally bargained contracts by the majority of the NMEA Executive Council, comprised of delegates from regional constituent local bargaining units, before submission in writing to the membership of the affected bargaining unit. The Board maintained that, in essence, the NMEA Executive Council is *independent* of the local unit, and as such constituted an improper collective bargaining agent since the Board would be forced to negotiate with members of other school districts who are members of the Executive Council.

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[69] In an analogous case, the Circuit Court of Milwaukee County, Wisconsin denied a similar motion in the post-*Abood* case of Browne v. Milwaukee Bd. of Sch. Directors, No. 410-584 (Aug. 22, 1977).

[70] *In re* Kalkaska Pub. Schs. Bd. of Educ. v. Northern Mich. Educ. Ass'n, 1977 MERC Lab. Op. 343.

The Board's position constituted an attack upon regional collective bargaining efforts. To buttress this attack, the Board argued that internal union procedures calling for regional ratification by the Executive Council rather than ratification by the affected local bargaining unit created an inherent conflict of interest between regional and local objectives.

The evolution of regional collective bargaining associations such as the NMEA was set forth in *Public Schools-Multi-Unit Common Bargaining Agents: A Next Phase in Teacher-School Board Bargaining in Michigan.*[71] There, the general objectives of regional bargaining were stated to be:

> (1) A long-run goal of one master contract for the districts covered by the multi-unit bargaining agent, negotiated through a multi-employer bargaining arrangement.
>
> (2) Short of a multi-employer bargaining arrangement, a common bargaining front so that in the event of a strike in one district, the number of strikers or potential strikers would exceed the number it would be feasible to fire and replace.
>
> (3) All local associations in the area (usually a county) to become a part of the multibargaining arrangement.
>
> (4) Availability of more expertise for the bargaining process through broader base support for more experience and professional teams.
>
> (5) Stabilization of the bargaining team membership, since the turn-over among bargaining committee members in many of the local associations is enormous. In some cases there is 100 percent turn-over from one bargaining year to the next, which results in relatively inexperienced members.[72]

MERC has held that "[r]atification is a matter which is exclusively within the internal regulations of the union."[73] Further, the Sixth Circuit, in *Houchen Market of Elizabethtown, Inc. v. NLRB*,[74] stated:

> The union, by virtue of its certification as exclusive agent, was empowered by its members to make agreements on behalf of the employees it represented without securing the approval of those employees.

In the *Kalkaska* case, the NMEA maintains that under established law, once a sufficient showing of interest has been shown by the collective bargaining agent, and proper composition of the bargaining unit is established, it is the decision of the employee teachers, and not the board, as to *who* shall be the authorized collective bargaining representative. Further, while the internal union ratification procedure does provide for Executive Council (regional) approval of the local unit agreement, under NMEA procedures, the local unit retains the ultimate right of approval and may vote to reject an agreement ratified by the Executive Council.

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[71] 27 Lab. L.J. 520-527 (1976).

[72] *Id.* at 523.

[73] Village of Chesaning, 1974 MERC Lab. Op. 580, 585.

[74] 375 F.2d 208, 212 (6th Cir. 1967).

It should be noted, however, that if the Executive Council rejects a tentative agreement which has been transmitted to it by the NMEA negotiators for the local unit (with or without any recommendation), then the members of the local bargaining unit cannot vote upon the proposed pact which may have been quite satisfactory to them. Thus, regional objectives sought by the NMEA Executive Council may override, by veto, local unit desires. On the other hand, the board may lack standing to assert alleged conflicts between local and regional interests, especially in light of the fact that local teachers have elected to be represented by the larger group. The issue will, no doubt, be central to the upcoming decision in the Michigan Court of Appeals.

CONCLUSION

This paper is not intended to be encyclopedic although entitled *Recent Court Decisions on Collective Bargaining in the Public Sector*. Therefore, some choice as to what cases are important had to be made. If there is any unifying theme to the cases selected it would be the harmonizing of collective bargaining agreements with either individual rights of teachers or statutory rights and duties accorded boards of education.

Much of the subject matter found in collective bargaining agreements is the subject of state statutes. Courts will customarily try to harmonize inconsistencies by trying to follow the doctrine that the specific prevails over the general and the more specific over the less specific.

While courts have been willing to allow collective bargaining agreements negotiated under statutory authority to prevail over local rules, charters or ordinances, there is some reluctance to allow such collective bargaining agreements to overrule public policy as expressed in statutes. This, of course, presents another question as to what is state public policy since some ordinances are designed for the protection of certain types of employees. An example would be the requirement that fire fighters have a day off between each day of employment. It is commonly accepted that fire fighters may waive that requirement in their collective bargaining agreement.

Part of the conflict arising between statutes and permissible public employee bargaining subject matter arises from adopting a trade union form of unionism in the public employment sector. There is far less reason for the private sector to recognize a limit on what is negotiable than there is for the public sector to do so. Although it is not foreseeable that more stringent legislation will limit the content of collective bargaining agreements in the public sector, it is foreseeable that public support will waver for the bargaining table as a means of resolving dispute in the public sector. To some extent, failure of voters to supply necessary funds for school operation may be seen as that kind of reaction. What is really called for is a restructuring of the methods by which collective bargaining operates in the public sector to create a procedure which is uniquely suited to, and more adequately serves, both the public and the employee rather than trying to alter the ill-fitting suit of private sector collective bargaining practices.

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*Employee Nonreappointment: What Constitutes a Stigma?**

Robert E. Phay
Professor Of Public Law and Government
University Of North Carolina at Chapel Hill

A few years ago a school board decision not to reappoint a nontenured faculty member went unchallenged in the courts. In recent years, however, there has been a plethora of court decisions on this issue. While the law in this area is still emerging, a recent line of federal cases, applying constitutional due process concepts to public institutions, culminated in two important 1972 Supreme Court decisions—*Board of Regents v. Roth*[1] and *Perry v. Sindermann*.[2] These two decisions presented two questions: Does a nontenured teacher have a constitutionally protected right to be told the reasons for the nonreappointment; and, if so, does he have a right to a hearing to determine whether the reasons are constitutionally permissible ones which can be proven by the institution. These cases, both decided by 5-3 majorities, established the constitutional ground rules for the nonrenewal of teacher appointments.

In *Roth*, Justice Potter Stewart stated that the only question presented to the Court was whether David Roth, an assistant professor of political science at Wisconsin State University-Oshkosh, "had a constitutional right to a statement of reasons and a hearing on the University's decision not to rehire him for another year. We hold that he did not."[3] The Court said that the requirements of procedural due process (providing reasons and a hearing) would apply only if the teacher had been deprived of a constitutionally protected liberty or property right.[4] It found that Roth had no "property" interest in continued employment because (1) his contract provided for only one year's service and (2) he failed to demonstrate any de facto or informal tenure system that created more than an "abstract concern in being rehired."

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[1] 408 U.S. 564 (1972).

[2] 408 U.S. 593 (1972).

[3] Board of Regents v. Roth, 408 U.S. 564, 569 (1972).

The Court also held that the nonreappointment did not infringe upon Roth's "liberty" interest.[5] It noted that the institution did not make any charge against him

> that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty or immorality. Had it done so, this would be a different case. For "[w]here a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential...." In such a case, due process would accord an opportunity to refute the charges before University officials.[6]

Furthermore, there was no evidence that nonreappointment had foreclosed Roth's freedom to take advantage of other employment opportunities. The Court found that because the institution had neither harmed his reputation nor interfered with his freedom to contract, the university authorities were not required to give him reasons and a hearing when they decided not to renew his contract.

In *Sindermann*, the Court held that lack of a contractual or tenure right to re-employment, taken alone, did not defeat the teacher's claim that the nonrenewal of his contract violated his free speech right under the first and fourteenth amendments. It held that Sindermann, a professor of government at Odessa Junior College in Texas, should have been given a hearing to determine whether the school's decision not to renew his contract was based on his exercise of free speech. The Court said that Sindermann's

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[4] Although Roth had alleged that the renewal of his contract was based on the exercise of his right of freedom of speech, that issue was not before the Supreme Court.

[5] One commentator has written: "[N]o case prior to [*Roth*] . . . had even hinted at *Roth's* wizened view that liberty in a free society can be conceived as something having nothing to do with fundamental fairness of how facts are determined and standards are applied in the Administrative State." Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 Cornell L. Rev. 445,489 (1977). For other comments on recent developments in this area, *see Procedural Due Process: Protection of Liberty Interests in Probationary Teacher Re-employment*,22 S.D.L. Rev. 180 (1977); Monaghan, *Of Liberty and Property*, 62 Cornell L. Rev. 405 (1977); *The Supreme Court, 1975 Term*, 90 Harv. L. Rev. 58 (1976); Dixon, *The "New" Substantive Due Process*, 1976 B.Y.L. Rev. 43 (1976).

[6] Board of Regents v. Roth, 408 U.S. 564, 573-74 (1972), *citing* Wisconsin v. Constantineau, 400 U.S. 433 (1971). This language has been recited frequently in later employment cases. *See* Cato v. Collins. 539 F.2d 656 (8th Cir. 1976); Kaprelian v. Texas Woman's Univ., 509 F.2d 133 (5th Cir. 1975); Buhr v. Buffalo Pub. Sch. Dist., 509 F.2d 1196 (8th Cir. 1975); Stewart v. Pearce, 484 F.2d 1031 (9th Cir. 1973); Coen v. Boulder Valley Sch. Dist., 402 F. Supp. 1135 (D. Colo. 1975); Ferris v. Special Sch. Dist., 367 F. Supp. 459 (D. Minn. 1973); Walker v. California State Bd. of Trustees, 351 F. Supp. 997 (W.D. Pa. 1972), *aff'd mem.*, 485 F.2d 683 (3d Cir. 1973).

> lack of a contractual or tenure "right" to re-employment for the 1969-70 academic year is immaterial to his free speech claim. Indeed, twice before, this Court has specificially held that the nonrenewal of a nontenured public school teacher's one-year contract may not be predicated on his exercise of First and Fourteenth Amendment rights.... We reaffirm those holdings here.[7]

The Court also elaborated on the concept of the "property" interest involved in the nonrenewal of a nontenured teacher's contract. Sindermann alleged that, although the college at which he taught had no formal tenure program, there was in practice an informal or de facto tenure system fostered by the college and recognized in its published policies. The Court held that if the existence of that informal system could be proved, the system would give rise to a legitimate expectancy of re-employment and Sindermann would be entitled to continued employment unless good reason for dismissal was proven at a hearing.

A de facto tenure system, which the Sindermann decision declared to be a property right protected by the constitution, is usually created by state statute, institutional policy, or contract.[8] For example, a teacher tenure statute may set forth the permissible reasons and required procedures for nonreappointment. If it does, the fourteenth amendment protects these "property" interests by requiring that a school board comply with the statutory provisions before voting not to rehire a teacher. "Those interests protected attain constitutional status by virtue of the fact that they have been initially recognized and protected by state law. Procedural guarantees apply whenever the state seeks to remove or alter them."[9]

Another example is provided by a board regulation that requires the governing board to provide probationary teachers with an opportunity for a hearing before it votes on whether to renew a contract. The board policy gives the teacher an expectancy of continued employment, *i.e.*, a property interest, until a hearing is provided. However, a grant of a specific procedural guarantee does *not* confer a broad constitutional right to the entire range of due process safeguards. "The property interest in re-employment [is] itself conditioned by the procedural limitations which

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[7] Perry v. Sindermann, 408 U.S. 593, 598 (1972).

[8] *See* Paul v. Davis, 424 U.S. 693 (1976); Bishop v. Wood, 426 U.S. 341 (1976); Board of Regents v. Roth, 408 U.S. 564 (1972).

[9] Paul v. Davis, 424 U.S. 693, 710 (1976).

[have] accomplished the grant of that interest."[10] Furthermore, if a school board voluntarily gives reasons for not retaining a teacher but denies a hearing, the teacher cannot claim a violation of his due process rights unless the board's reasons are constitutionally impermissible ones.[11]

In summary, the *Roth* and *Sindermann* cases set out four situations in which a probationary teacher whose contract is not renewed has a right to both an explanation of why he was not reappointed (notice) and a hearing on those reasons. The first situation is one in which the nonreappointment will seriously damage the person's standing, reputation, or associations in the community. The second occurs when the publicity given the nonreappointment by school officials will foreclose the teacher's job opportunities. The third occurs when the nonreappointment was made because of the exercise of a constitutionally protected right, such as freedom of speech. The fourth occurs when de facto tenure exists, as it did in the *Sindermann* case. The first two situations involve questions concerning a liberty right of the teacher—has the teacher been "stigmatized" by the nonreappointment. This paper will analyze the cases that have considered this issue.

Roth sets forth the general principles for determining when procedural due process applies to a nonreappointment because a liberty interest has been affected. The Supreme Court said that a "liberty" interest is affected when "a person's good name, reputation, honor or integrity" is at stake; when nonrenewal "seriously damages [a teacher's] standing and associations in his community"; or when nonrenewal "imposes a stigma or other disability that forecloses his freedom to take advantage of other employment opportunities."[12] What exactly do these words mean? Since the *Roth* decision, many courts have identified circumstances under which nonreappointment imposes a stigma or damages the reputation and standing of a teacher in derogation of a "liberty" interest. This analysis will examine those situations in which a "liberty" interest has been identified by the courts and the school has been directed to provide notice and a hearing; and those situations in which courts have said no liberty interest has been violated and the school may decline to reappoint a teacher without any procedural observances.

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[10] Buhr v. Buffalo, 509 F.2d 1196, 1199 (8th Cir. 1975).

[11] *See, e.g.*, Ryan v. Aurora City, 540 F.2d 222 (6th Cir. 1976) (school board regulations requiring reasons to be given a nonrenewed teacher do not confer a liberty or property right); Jeffries v. Turkey Run Consol. Sch. Dist., 429 F.2d 1 (7th Cir. 1974) (teacher's constitutional rights limited to procedural guarantees of state tenure law). If there is no teacher tenure statute, the school board may adopt its own regulations. Courts will examine a school's policies and regulations to determine whether a probationary teacher is given a legitimate expectation of re-employment, which would require a hearing and reasons before nonrenewal. *See* Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972); Grimm v. Cates, 532 F.2d 1034 (5th Cir. 1976) (institutional regulations do not give rise to a property interest if, as a matter of customary practice, they have never been followed).

[12] Board of Regents v. Roth, 408 U.S. 564, 573 (1972).

UNDISCLOSED REASONS

Several teachers have argued that a nonrenewal with no reasons given is subject to derogatory interpretation by third parties and, therefore, affects employment opportunities and standing in the community. The courts have uniformly rejected this contention.[13] In a case from Louisiana, a black school teacher claimed that his nonretention was racially motivated.[14] After rejecting this claim, the federal district court wrote: "The mere fact that nonretention ... might make a teacher less attractive to other school systems does not constitute deprivation of liberty so as to entitle the teacher to a pretermination hearing."[15] In a California case, the Ninth Circuit Court of Appeals found too speculative a professor's claim that nonrenewal, without an opportunity to refute charges, adversely affects his professional standing.[16]

Courts have further held that a teacher may not challenge the substantive basis for nonrenewal when he has not alleged that his nonrenewal was for constitutionally impermissible reasons[17] because there is no constitutional requirement of disclosure of reasons or a hearing to challenge those reasons. If the board is not required to give a reason for nonretention, it is not required to produce substantial evidence to support its reason.

REDUCTION IN PERSONNEL

Not rehiring a probationary teacher solely because of a nondiscriminatory reduction in school personnel does not constitute a deprivation of a liberty interest. No stigma exists, the Fifth Circuit Court of Appeals said, when three teachers were not retained because of a necessary reduction in the number of employees.[18] The board, therefore, could use any standard for deciding whom not to retain as long as the standard did not violate constitutional rights. A federal district court in Texas applied this rule in holding that when teachers were not retained in order to implement a desegregation plan, no hearing was required because no charges had been made against the teachers and there was no evidence of discrimination.[19]

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[13] Cato v. Collins, 539 F.2d 656 (8th Cir. 1976); Burdeau v. Trustees of Cal. State Colleges, 507 F.2d 770 (9th Cir. 1974), *cert. denied*, 423 U.S. 989 (1975), *reh. denied*, 423 U.S. 1081 (1975). *See also* Wood v. University of S. Miss., 539 F.2d 529 (5th Cir. 1976); Buhr v. Buffalo, 509 F.2d 1196 (8th Cir. 1975).

[14] Griffin v. Lancaster, 400 F. Aupp. 421 (W.D. La. 1975).

[15] *Id.* at 423, *citing* Kelly v. West Baton Rouge, 517 F.2d 194 (5th Cir. 1975).

[16] Burdeau v. Trustees of Cal. State Colleges, 507 F.2d 770 (9th Cir. 1974).

[17] *See* Weathers v. West Yuma County School Dist., 530 F.2d 1335 (10th Cir. 1976); Buhr v. Buffalo Pub. School Dist., 509 F.2d 1196 (8th Cir. 1975); Jeffries v. Turkey Run Consol. School Dist., 492 F.2d 1 (7th Cir. 1974).

[18] Collins v. Wolfson, 498 F.2d 1100 (5th Cir. 1974).

PERSONALITY AND EMOTIONAL STATE

Teachers also have claimed a right to a hearing when the nonreappointment was based on the personality or emotional state of the teacher. A Minnesota federal district court rejected such claims, ruling that the superintendent's recommendations to the school board that a teacher not be reappointed because she was "defensive, rude, argumentative and sullen" were not the type of charges that would "seriously damage" her standing in the community.[20] The Ninth Circuit Court of Appeals also stated that "personality differences or difficulty in getting along with others" are not the sort of accusations that warrant a hearing.[21] In that case, the teacher had been charged with insubordinate, hostile, and aggressive behavior. An Illinois court held that a teacher evaluation stating that a teacher has an "extreme anti-establishment obsession" also does not constitute deprivation of liberty.[22]

RACISM OF TEACHER

A situation that does stigmatize and therefore gives rise to a "liberty" interest is an accusation that a teacher is a racist. In a case from Minnesota, a federal district court found that the primary reason for not retaining a junior college professor were charges of racism that the Black Student Union had made against him and had put into his file.[23] Such charges were held to affect a person's reputation or good name, thereby warranting a hearing.

MENTAL INCAPACITY

Two "stigma" cases involved allegations by school officials about the mental state of probationary teachers. In a Ninth Circuit decision that arose in California,[24] a professor was ordered to have a psychiatric examination to determine his mental competency to teach. Though no reason was given for the order, the teacher refused to submit to it because he believed that the order was given in retaliation for his participation in antiwar activities. Consequently, he was later transferred to the library and, in time, discharged for failure to perform his duties. The court

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19. Harkless v. Sweeny Indep. Sch. Dist., 388 F. Supp. 738 (S.D. Tex. 1975).
20. Ferris v. Special Sch. Dist., 367 F. Supp. 459, 463 (D. Minn. 1973). This case was ultimately decided on other grounds.
21. Gray v. Union City Inter. Educ. Dist., 520 F.2d 803 (9th Cir. 1975).
22. Lipp v. Board of Educ. of Chicago, 470 F.2d 802 (7th Cir. 1972).
23. Wellner v. Minnesota State Junior College, 487 F.2d 153 (8th Cir. 1973).
24. Stewart v. Pearce, 484 F.2d 1031 (9th Cir. 1973).

ordered his reinstatement, holding that a hearing should have been given before the order for a psychiatric examination was issued because such an order implied reasonable grounds for suspecting mental unfitness, thereby "creating a stigma [or] an official branding."[25] However, a federal district court in Minnesota concluded that a superintendent's recommendation to a school board that the plaintiff "should see a physician to evaluate her well-being" did not stigmatize her.[26]

INCOMPETENCE, INDADEQUACY, OR NEGLECT OF DUTY

School allegations of incompetence, unprofessionalism, or inadequacy in the classroom have been the basis of several suits seeking a right to a hearing on those charges. In a case from Colorado, a teacher contended that criticism of her classroom performance in her personnel file gave her a right to a hearing before a decision was made on whether to renew her contract.[27] The federal district court held that there had been no denial of due process or deprivation of liberty, since the comments were not charges that "might seriously damage her standing" or that attacked her "good name or reputation."

In a similar case, three Florida community college instructors argued that the presence of memoranda in their files charging neglect of duty for an unexcused absence damaged their reputations and, therefore, violated a "liberty" interest.[28] The court dismissed the claim because disciplinary action had been neither taken nor threatened. Since the teachers did not allege that the memoranda would block future promotion or otherwise injure them, no deprivation of liberty existed. Other courts have held that charges of inability to maintain discipline and order in the class,[29] dissatisfaction with a teacher's techniques or classroom conduct,[30] failure to follow office directives or curriculum requirements,[31] or tardiness,[32] did not impair the teacher's ability to obtain employment or impugn his reputation or honor so as to deprive him of a liberty right.

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[25] *Id.* at 1034.

[26] Ferris v. Special Sch. Dist., 367 F. Supp. 459, 463 (D. Minn. 1973). *Cf.* Ferndale Educ. Ass'n v. School Dist., 242 N.W.2d 481 (Mich. Ct. App. 1976) (teacher entitled to hearing after being dismissed for having a history of nervousness and because of a medical report predicting nervous attacks).

[27] Coen v. Boulder Valley Sch. Dist., 402 F. Supp. 1335 (D. Colo. 1975).

[28] Collins v. Wolfson, 498 F.2d 1100 (5th Cir. 1974).

[29] Griffin v. Lancaster, 400 F. Supp. 421 (W.D. La. 1975). *See also* Setty v. Minnesota State College Bd., 235 N.W.2d 594 (D. Minn. 1975); Miller v. School Dist. of Cook County, 354 F. Supp. 922 (N.D. Ill. 1973); Brouillette v. Board of Directors, 519 F.2d 126 (8th Cir. 1975). *But see* Huntley v. Community Sch. Bd., 543 F.2d 979 (2d Cir. 1976) (principal whose contract was not renewed because of frequent fires and other disorders is entitled to a hearing on charge of incompetency).

[30] Laborde v. Franklin Parish Sch. Dist., 510 F.2d 590 (5th Cir. 1975). *See* Weathers v. West Yuma Sch. Dist., 530 F.2d 1335 (10th Cir. 1976).

[31] Johnson v. Harvey, 382 F. Supp. 1043 (E.D. Tex. 1974).

[32] Brouillette v. Board of Directors, 519 F.2d 126 (8th Cir. 1975).

INSUBORDINATION

Although an allegation of insubordination would not seem to be more stigmatizing than an allegation of incompetence, a federal district court in Delaware required a hearing on a nonreappointment based on allegations of severe insubordination and persistent failure to comply with administrative directives.[33] The court held that this charge would seriously impair the teacher's ability to obtain employment in another school. The evidence showed that reasons for nonrenewal were usually discussed among the school districts and such a charge would effectively prevent a teacher from obtaining employment elsewhere. Since the court found no basis for the charge of insubordination, it held that the board's action violated substantive and procedural due process.

A federal district court in Texas, however, held that a teacher was not stigmatized by charges that he failed to cooperate with the administration or to supervise building security as directed.[34]

DISHONESTY AND IMMORALITY

Charges of dishonesty or immorality are particularly damaging to a teacher's reputation. While no cases involving teachers accused of dishonesty or immorality have come before the Supreme Court, the Court has considered whether damage to reputation is a basis for requiring a hearing on such accusations. In 1971, it ruled that posting a list in all retail liquor stores of people to whom the sale or gift of liquor was prohibited for one year deprived those listed of a liberty right without due process.[35] The names placed on the list were people whose excessive drinking had caused either family or social disturbances. The plaintiff in the case was listed on such a notice without having been warned or given a chance to be heard. The Court said that inclusion on such a public list creates a stigma or badge of disgrace that cannot be imposed by the state without a proper hearing.

This decision was substantially modified by the Supreme Court in *Paul v. Davis*.[36] In that case, the Louisville police department had prepared a list of names and pictures of "active shoplifters" and issued it to stores that might be victimized by those listed. This list included the plaintiff, who had been arrested for shoplifting but whose case was later dismissed.

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[33] Morris v. Board of Educ., 401 F. Supp. 188 (D. Del. 1975).

[34] Johnson v. Harvey, 382 F. Supp. 1043 (E.D. Tex. 1974).

[35] Wisconsin v. Constantineau, 400 U.S. 433 (1971).

[36] 424 U.S. 693 (1976).

Plaintiff brought an action under § 1983 of the Civil Rights Act of 1871,[37] claiming that the erroneous publication had stigmatized him and would affect his employment opportunities in the community. The Court denied that "reputation alone" is either a liberty interest or a property interest protected by the fourteenth amendment. It said that "those interests protected attain constitutional status by virtue of the fact they have been recognized by state law. Procedural guarantees apply whenever the State seeks to remove or alter them."[38] The Court noted that the plaintiff had not been fired because of the defamation, nor had his status been altered as a matter of state law.

The *Roth* decision makes clear that a teacher must be given a hearing if charges of dishonesty or immorality are the basis for a board's decision not to rehire.[39] Since *Roth*, most morality cases have involved teacher discharges rather than nonreappointment. In discharge cases, a hearing is required when requested by the teacher, whatever the reason for the discharge.[40] In many nonretention cases, the courts have specifically noted that no charges of dishonesty or immorality were alleged and therefore no hearing was due.[41] Thus it seems clear that when either dishonesty or immorality is the reason for nonreappointment, a hearing is required as a matter of procedural due process.

TEACHER'S ALLEGATIONS THAT CHARGES ARE FALSE

Common to most teacher demands for a hearing when reasons or explanations have been given for a nonreappointment is the claim that the charges are false. The teacher's allegation is seldom grounds for requiring a hearing. However, in a Minnesota case, the teacher introduced evidence that her supervisor had placed false and derogatory evaluations in her file that had resulted in the board's not renewing her contract. The court determined that the state's referring to the plaintiff as "defensive, rude, and argumentative" did not give rise to a "liberty" interest under *Roth* standards, but it held that, when adverse reports are "maliciously designed for reasons of personal calumny, hatred, or dislike,"[42] a teacher must be given a full hearing.

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[37] Most cases challenging nonreappointment have been brought under § 1983 of the Civil Rights Act of 1871, a federal statute that gives an individual citizen the right to sue any state or local government official or employee who deprives another of his rights or privileges secured by the Constitution and by law. In the usual case, a teacher sues a school board for not reappointing him, claiming infringement of a liberty or property interest, but if the court finds that no constitutionally protected property or liberty interest is involved, then nonreappointment cannot deprive the teacher of such an interest, and he, therefore, has no constitutional right to be given the reasons for the nonreappointment or to be provided a hearing. If no such right exists, then by definition there is no basis for a lawsuit under § 1983. *See, e.g.*, Buhr v. Buffalo, 509 F.2d 1196 (8th Cir. 1975); Ryan v. Aurora City Bd. of Educ., 540 F.2d 222 (6th Cir. 1976); *cert. denied*, 45 U.S.L.W. 3460 (U.S. Jan. 11, 1977); Jeffries v. Turkey Run Consol. Sch. Dist., 492 F.2d 1 (7th Cir. 1974). For a discussion of § 1983 actions, *see Section 1983 and Federalism*, 90 Harv. L. Rev. 1135 (1977); Hogue, *Board Members and Administrator Liability Since Wood v. Strickland*, Sch. L. Bull., VII, no. 4 (Oct. 1976).

[38] Paul v. Davis, 424 U.S. 693, 710 (1976).

[39] Board of Regents v. Roth, 408 U.S. 564, 573 (1972).

[40] *See, e.g.*, Sullivan v. Meade Independent Sch. Dist., 530 F.2d 799 (1976); Petit v. State Bd. of Educ. 10 Cal. 3d 29, 513 P.2d 889, 109 Cal. Rptr. 665 (1973). Dismissal for undisclosed reasons may offend the Constitution even if no charges are made. *See* Burdeau v. Trustees of Cal. State Colleges, 507 F.2d 770 (9th Cir. 1974), *cert. denied*, 423 U.S. 989 (1975); Sigmon v. Poe, 381 F. Supp. 387 (W.D.N.C. 1974).

[41] *See* Laborde v. Franklin, 510 F.2d 590 (5th Cir. 1975); Gray v. Union County Intermediate Educ. Dist., 520 F.2d 803 (8th Cir. 1975); Jeffries v. Turkey Run, 492 F.2d 1 (7th Cir. 1974); Coen v. Boulder Valley, 402 F. Supp. 1336 (D. Colo. 1975); Griffin v. Lancaster, 400 F. Supp. 421 (W.D. La. 1975).

CHARGES MADE PUBLIC

When the issue has arisen, the courts have firmly established that there is no stigma and infringement of a "liberty" interest if the charges, or reasons for nonrenewal, are not made public.[43] For example, in the recent Supreme Court decision of *Bishop v. Wood,*[44] the Court held that a person's good name or honor is not impaired if the reasons for the discharge are communicated only in private. In that case, a policeman was discharged for inadequate job performance and was denied a hearing, but the reasons for discharge were never made public.

In accord is a Fifth Circuit Court decision holding that if a probationary teacher is simply informed by letter that the board has voted not to renew the contract, he has not been stigmatized.[45] It would follow, therefore, that if the board told the teacher its reasons during a closed meeting, there would be no stigma.[46]

The only time a hearing must be provided is when "[T]he governmental agency has made or is likely to make the allegedly stigmatizing charges public in any official or intentional manner, other than in connection with the defense of [related legal] action."[47] Not all publicity triggers due process requirement, however. In a case before the Eighth Circuit Court of Appeals, a teacher from an Iowa community college, who was not going to be reappointed because he was considered to be an inadequate teacher, requested and received a private hearing before his current contract expired.[48] Although his contract was not renewed after this private hearing, he was given a public hearing. When the nonrenewal was reaffirmed, he sued, claiming that the allegations of inadequacy produced during the private hearing had stigmatized him. The court rejected the teacher's charge, noting that the board had never publicized its criticisms.

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[42] Ferris v. Special Sch. Dist., 367 F. Supp. 459, 462 (D. Minn. 1975).

[43] *See, e.g.,* Wood v. University of S. Miss., 539 F.2d 529 (5th Cir. 1976); Cato v. Collins, 539 F.2d 656 (8th Cir. 1976); Kaprelian v. Texas Woman's Univ., 509 F.2d 133 (5th Cir. 1975); Brouillette v. Board of Directors, 519 F.2d 126 (8th Cir. 1975); Buhr v. Buffalo, 509 F.2d 1196 (8th Cir. 1975); Williams v. Hyde County, 490 F.2d 1231 (4th Cir. 1974); Bradford v. Tarrant County Junior College Dist., 492 F.2d 133 (5th Cir. 1974).

[44] 426 U.S. 341 (1976).

[45] Wood v. University of S. Miss., 539 F.2d 529 (5th Cir. 1976).

[46] The newly adopted nonreappointment procedures of the sixteen constituent institutions of The University of North Carolina give a faculty member whose contract has not been renewed a right to a private conference with his department chairman at which the reasons for the nonreappointment will be discussed.

[47] Ortwein v. Mackey, 511 F.2d 696, 699 (5th Cir. 1975).

In another Eighth Circuit case,[49] an Arkansas school board sent a letter of nonrenewal to a teacher who challenged the nonrenewal on the grounds that the board had made the charges against him public during a hearing. The trial court dismissed this contention, and the appellate court affirmed, saying: "[S]uch disclosure of the reasons for nonrenewal at the teacher's request cannot form the basis for an interest in liberty."[50] At least one court has also implied that a notice of a hearing, gratuitously provided by the board, that contains no charges or reasons for the nonreappointment does not create a "liberty" interest or give rise to further due process requirements.[51]

Publicity that stigmatizes is not limited to public statements or accusations; it includes placing information in a teacher's file that is available to prospective employers.[52] On the other hand, the courts have held that if derogatory material is placed only in a confidential file, the teacher is not stigmatized.[53]

CONCLUSION

Denial of a liberty interest occurs only when such an interest can be identified, either because school officials have made public accusations that impair the teacher's reputation or standing in his community (*e.g.*, charges of criminality, immorality, dishonesty, or mental incompetence) or because such charges are placed in a personnel file that is open to the public or to future employers and forecloses job opportunities. The type of accusation or reason for nonreappointment that infringes a "liberty" interest is very limited. Charges of tardiness, lack of discipline, incompetency, failure to perform satisfactorily, poor relations with students, and unprofessional conduct have been held not to violate a liberty interest. Even though such charges will negatively reflect on a teacher and probably reduce his ability to obtain employment, the courts have not deemed them damaging enough to constitute a deprivation of liberty.

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[48] Brouillette v. Board of Directors, 519 F.2d 126 (8th Cir. 1975).

[49] Cato v. Collins, 539 F.2d 656 (8th Cir. 1976).

[50] *Id.* at 660. *Cf.* Kaprelian v. Texas Woman's Univ., 509 F.2d 133 (5th Cir. 1975) (stigmatizing material produced at trial represents no deprivation of liberty).

[51] Setty v. Minnesota State College Bd., 235 N.W.2d 594 (Minn. 1975).

[52] *See, e.g.*, Cato v. Collins, 539 F.2d 656, 660 (8th Cir. 1976); Buhr v. Buffalo, 509 F.2d 1196, 1199 (8th Cir. 1975). *But see* Codd v. Velger, 429 U.S. 624 (1977).

[53] Ortwein v. Mackey, 511 F.2d 696 (5th Cir. 1975); Williams v. Hyde County, 490 F.2d 1232, 1233 (4th Cir. 1974).

In general, a school board may establish criteria and procedures for not rehiring a probationary teacher. These procedures need not provide for a grievance mechanism or notification of the reasons for nonreappointment. A probationary teacher may not demand a hearing if the school board merely informs him of the decision or privately communicates the reasons therefore, unless state statute or school board regulations create such a right or unless the board has infringed upon a constitutional right. However, because it is often difficult to know when charges stigmatize a teacher or when a teacher is denied a constitutional right, it is recommended that school authorities talk privately with the teacher about why he was not reappointed *if* he requests such a conference. Moreover, if the teacher can establish a prima facie case that impermissible reasons were the grounds for nonreappointment, specific reasons for the nonreappointment and a hearing must be given.

If the teacher thinks the nonreappointment has infringed upon a liberty or property interest and the board has not provided a hearing, the teacher may sue for a hearing and reinstatement. The burden is on the teacher to prove that stigmatizing charges have been made; that these charges are or will become publicly known; that damage to his good name or reputation has or will occur or that his employment opportunities have been foreclosed; that the charges were the basis for the nonrenewal; and that the charges were false.

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Recent Developments in Sex Discrimination Litigation

MARTHA M. MCCARTHY
ASSISTANT PROFESSOR
INDIANA UNIVERSITY

Sex discrimination, long a philosophical and moral issue, recently has become a controversial judicial issue as well. In fact, during the past decade a plethora of litigation has emerged from claims of sex bias. Due to the range of legal questions raised under the broad rubric of sex discrimination, this paper will focus on selected theses that seem destined to evoke continued judicial attention. In an attempt to ascertain trends, cases addressing differential treatment of men and women in the following specific areas will be explored: student admissions practices, student athletic programs, employee pregnancy benefits and maternity leave policies, employee retirement benefits programs, and prerequisites to employment. In addition, jurisdictional issues under Title IX of the Education Amendments of 1972 will be briefly discussed. Cases dealing with such topics as reverse discrimination and homosexuality, although important and certainly sex-related, will not be pursued here because the breadth of these issues is beyond the scope of this paper.

LEGAL FRAMEWORK

Legally-sanctioned differential treatment based on gender has a lengthy history. Traditionally, sex discrimination has been rationalized by an attitude of "romantic paternalism" which, in effect, has placed women, "not on a pedestal but in a cage."[1] Over 100 years ago, a justice on the Supreme Court made the following declaration about the status of women in American society:

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[1] Frontiero v. Richardson, 411 U.S. 677, 684 (1972).

> Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. . . . [2]

In this case, *Bradwell v. Illinois*, a female attorney was denied admission to the bar based on the "almost axiomatic truth" that "God designed the sexes to occupy different spheres of action and that it belonged to men to make, apply, and execute the laws."[3]

By 1908 the Supreme Court had not changed its sentiments and reflected the prevailing social norms by upholding a law which mandated different working conditions for females and males engaged in factory work. The Court noted that woman's physical structure and her "performance of maternal functions place her at a disadvantage which justifies a difference in legislation in regard to some of the burdens which rest upon here."[4]

Not until 1971 did the United States Supreme Court conclude that a sex-based classification was unconstitutional. In *Reed v. Reed*[5], a case often cited as the turning point in women's rights litigation, the Court invalidated an Idaho statute that gave men preference over women as administrators of estates. The Court concluded that the dissimilar treatment of men and women who were similarly situated violated the guarantees of the equal protection clause of the fourteenth amendment. In 1973, the high court again addressed a discriminatory sex classification in *Frontiero v. Richardson*[6]. This case involved a challenge to a statute that denied female members of the armed forces dependent benefits for spouses when such benefits were available to males. The Court struck down the statute as unconstitutional and offered the following rationale:

> Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of

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[2] Bradwell v. Illinois, 16 Wall. 130, 141 (1873) (Bradley, J., concurring).
[3] *Id.* at 132.
[4] Muller v. Oregon, 208 U.S. 412, 421 (1908).
[5] 404 U.S. 71 (1971).
[6] 411 U.S. 677 (1972).

> a particular sex because of their sex would seem to violate the "basic concept of our system that legal burdens should bear some relationship to individual responsibility". . . .[7]

While invalidating the discriminatory statute, a majority of the justices in *Frontiero* did not conclude that sex belongs in the category of 'suspect classes' which are afforded preferred constitutional status under the equal protection clause. Classifications based on race,[8] alienage,[9] national origin,[10] and illegitimacy[11] have been deemed 'suspect' which means that legislation based on such characteristics will evoke strict judicial scrutiny and must be justified by a compelling governmental interest. In *Frontiero*, four members of the Supreme Court wished to characterize sex as a suspect class[12] and if one more justice had been persuaded to endorse this position, the complexion of subsequent sex discrimination cases no doubt would have been significantly altered. Such a declaration would have triggered strict judicial scrutiny in all constitutional assaults on sex-based classifications.

However, since sex has not been elevated to the category of suspect classes, the Court has often reverted to the traditional equal protection standard of review which requires only the existence of a rational relationship between the classification and a permissible governmental objective. In some cases, an in-between standard, referred to as the 'substantial relationship test',[13] has been followed. Using this test, the Court evaluates the means employed to determine whether the policy in question has substantially furthered a permissible governmental objective.

As a result of judicial hesitancy to employ the stringent equal protection test, advocates of women's rights increasingly have turned to various statutory grounds instead of bringing suits under provisions of the Federal Constitution. The most popular legal tool currently is Title VII of the Civil Rights Act of 1964 which prohibits discrimination based on color, race, national origin, religion, and sex in employment practices.[14] More recently, Congress enacted Title IX of the Education Amendments of 1972 which prohibits sex discrimination against beneficiaries of or participants in any educational program or activity receiving federal financial assistance.[15] Case law involving Title IX claims, however. is in its infancy because regulations for this piece of legislation were not finalized until 1975. The above overlapping constitutional and statutory grounds — the equal protection clause, Title VII, and Title IX — form the primary bases for the arguments used in the litigation discussed in the remainder of this paper.

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[7] *Id.* at 686, *citing* Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972).

[8] *See* Brown v. Board of Educ. of Topeka, 347 U.S. 483 (1954).

[9] *See* Graham v. Richardson, 403 U.S. 365 (1971).

[10] *See* Oyama v. California, 332 U.S. 633 (1948).

[11] *See* Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972).

[12] Only three of these justices remain on the Supreme Court. In no other case has the Court suggested that sex should be deemed a suspect class.

[13] *See* Reed v. Reed, 404 U.S. 71 (1971).

[14] 42 U.S.C. § 2000(e) (1970 & Supp. V 1975). *See* text accompanying note 108, *infra*, for a discussion of Griggs v. Duke Power Company, 401 U.S. 424 (1971), and the 'disparate impact' standard of review under Title VII.

ADMISSIONS PRACTICES

Sex-based discrimination in school admissions practices has been recognized as one of the most damaging injustices suffered by women because it affects not only educational opportunities but also future employment. Challenges to differential admissions policies have usually been based on the equal protection clause of the fourteenth amendment and have relied on principles established in litigation pertaining to racial discrimination.

However, since sex has not been deemed a 'suspect class', arguments which have been so persuasive in desegregation cases have often been ineffective when applied to claims of sex discrimination. Recently, the Third Circuit Court of Appeals articulated the following rationale for treating sex and race differently:

> We are committed to the concept that there is no fundamental difference between races and therefore, in justice, there can be no dissimilar treatment. But there are differences between the sexes which may, in limited circumstances, justify disparity in law.[16]

Hence, the notion of 'separate but equal' treatment, long disfavored in racial discrimination cases, is receiving judicial support in litigation involving sex discrimination. In challenges to discriminatory admissions practices, plaintiffs have had to substantiate the fact that specific inequities result from the practices rather than simply document that differential treatment exists.

For example, in *Kirstein v. Rector and Visitors of the University of Virginia,*[17] the federal district court held that the exclusion of women from the University of Virginia branch in Charlottesville deprived females of their right to equal educational opportunities. The court refrained from addressing the legality of separate but equal schools and instead based its decision on the inequities uncovered. The court reasoned that the uniqueness of the course offerings available only in Charlottesville, coupled with the special prestige attached to this campus, constituted a valid claim that women were denied equal protection of the laws when denied admission to the Charlottesville campus.

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[15] 20 U.S.C. § 1681 (Supp. V 1975).

[16] Vorchheimer v. School Dist. of Philadelphia, 532 F.2d 880, 886 (1976).

[17] 309 F. Supp. 184 (D. Va. 1970).

In contrast to *Kirstein*, male students challenging their exclusion from a state university campus for women did not find a receptive judicial forum in *Williams v. McNair.*[18] The South Carolina federal district court concluded that *Kirstein* did not apply because the male students in *McNair* failed to demonstrate that the women's college enjoyed special status or provided educational opportunities unavailable elsewhere. In short, the court endorsed the position that separate but equal educational opportunities satisfy the mandates of the equal protection clause. Extrapolating from *Kirstein* and *McNair*, one must conclude that only in situations where the excluded sex can prove that opportunities are unequal or that the exclusion results in concrete disadvantages will the courts hold that federal constitutional rights have been denied.

Consistent with the above line of reasoning, in 1976 the Third Circuit Court of Appeals upheld the operation of single-sex high schools in *Vorchheimer v. School District of Philadelphia.*[19] Subsequently, the United States Supreme Court, equally divided, affirmed the decision without delivering an opinion. The essential question presented in this case was whether the Federal Constitution forbids the maintenance of public single-sex high schools in which enrollment is voluntary and the educational offerings are essentially equal. The appellate court concluded that application of either the rational basis or substantial relationship test would warrant the same conclusion that the operation of separate, but equal schools for males and females is permissible under the equal protection clause. Furthermore, the court interpreted the Equal Educational Opportunity Act of 1974 as permitting sex segregation as long as the educational programs are academically and functionally equal for both sexes.[20]

The appeals court distinguished *Vorchheimer* from prior decisions in which sex classifications had been invalidated due to either the absence of a rational basis for the classification or the denial of equal opportunities to one sex. Noting that the courses offered in the two Philadelphia schools were of equal quality, the court concluded that the separation of sexes had a reasonable educational basis due to the respected theory that adolescents may study more effectively in single-sex high schools. The court also relied on the finding that the plaintiff's desire to attend the male academic high school was based on personal preference rather than on an objective evaluation of the offerings available in the two schools.[21]

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[18] 316 F. Supp. 134 (D. S.C. 1970), *aff'd per curiam*, 401 U.S. 951 (1971).

[19] 532 F.2d 880 (3d Cir. 1976), *aff'd by an equally dividea court*, 45 U.S.L.W. 4378 (April 19, 1977).

[20] U.S.C. § 1702 (a) (1) (Supp. 1976), as cited in Vorchheimer v. School Dist. of Phila., 532 F.2d 880, 883-85 (3d Cir. 1976). The court quoted Kahn v. Shevin, 416 U.S. 351, 356 (1974), where in the Supreme Court articulated that "(g)ender has never been rejected as an impermissible classification in all instances." Vorchheimer v. School Dist. of Phila., 532 F.2d 880, 886 (3d. Cir. 1976).

Although the Supreme Court endorsed the operation of separate but equal schools for males and females in *Vorchheimer*, this decision does not mean that the provision of *unequal* educational opportunities will withstand judicial scrutiny. Consequently, challenges by female students to gain admission to specific courses, traditionally reserved for males, have been more successful than challenges to single-sex schools. For example, in *Della Casa v. Gaffney*,[22] the exclusion of female students from auto shop was invalidated as a denial of equal protection. Also, in *Hickey v. Black River Board of Education*,[23] an Ohio federal district court ordered that industrial arts and home economics classes must be available to male and female students on equal terms. Using a similar rationale, courts have required school districts to admit interested female students to wood shop and metal shop classes.[24]

Differential admissions criteria which blatantly disadvantage female students also have been invalidated. In *Bray v. Lee*,[25] the admissions practices of the Boston Latin Schools were attacked on the grounds that they discriminated against female applicants. Due to the different seating capacities of the two schools, the Latin School for boys required a minimum score of 120 for admission while the girls' school required a minimum score of 133. The class action suit was initiated on behalf of the 197 girls scoring between 120 and 133 on the exam who were denied the opportunity of attending either school. The federal district court was unsympathetic to the physical plant problems and ruled that the same admission criteria must be applied to both sexes. Similarly, in *Berkelman v. San Francisco Unified School District*,[26] the school district's plan to admit an equal number of male and female students to the only school which offered an advanced college preparatory curriculum resulted in stricter admissions criteria for females. The Ninth Circuit Court of Appeals invalidated the differential admissions standards as an equal protection violation. The court did not agree that the school district's policy was a legitimate means for reaching its admittedly desirable goal of balancing the number of male and female students enrolled in the school.

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[21] Vorchheimer v. School Dist. of Phila., 532 F.2d 880, 886 (3d. Cir. 1976). In his dissenting opinion, Circuit Judge Gibbons admonished the majority for resurrecting the separate but equal doctrine which he thought had "passed from the fourteenth amendment jurisprudential scene over twenty years ago." (Gibbons, J., dissenting, *id.* at 888).

[22] Civil No. 171673 (Cal. Super. Ct. 1973) (Clearinghouse No. 9,308).

[23] Civil No. 73-889 (N.D. Ohio 1973).

[24] *See* Seward v. Della, Civil No. 134173 (Cal. Super. Ct. 1973) (Clearinghouse No. 16,922); Sanchez v. Baron, Civil No. 69-C-1615 (E.D. N. Y. 1971).

[25] 337 F. Supp. 934 (D. Mass. 1972).

[26] 501 F.2d 1264 (9th Cir. 1974).

The legal questions surrounding differential admissions standards seem far from settled, particularly in light of the issues raised in the current claims of reverse discrimination.[27] However, it does appear that courts will continue to sanction the existence of single-sex schools but will invalidate policies that clearly result in unequal educational opportunities for male and female students.

ATHLETIC PROGRAMS

Litigation challenging discrimination against female students in athletic programs has proliferated in recent years. Policies relating to athletics are being questioned under the equal protection clause as well as under Title IX of the Education Amendments of 1972. Most of the allegations of sex bias have focused on the exclusion of females from certain teams or on the inequities between male and female athletic programs.

The first case to receive widespread attention was *Brenden v. Independent School District.*[28] In this case, female students were denied participation on the male tennis, cross-country skiing, and cross-country running teams, and separate teams for females were not provided in any of these noncontact sports. The Eighth Circuit Court of Appeals concluded that a valid equal protection claim existed due to the lack of alternative competitive programs which would provide an equal opportunity for females.[29] The court rejected the high school athletic league's contention that relief was inappropriate because participation in interscholastic sports is considered a privilege and not a right. The court reasoned that regardless of whether there is an absolute right to engage in interscholastic athletics, female students were denied equal protection of the laws because benefits provided by the state to male students were denied to them.[30]

Similarly, in *Haas v. South Bend Community School Corporation,*[31] the high school athletic association rule that prohibited female students from playing on the male golf team was invalidated as an abridgement of equal protection guarantees. Although recognizing that differences in athletic ability could be a legitimate reason for establishing single-sex teams, the Indiana Supreme Court found no justification for denying females the opportunity to compete when only one athletic program was provided. There have been isolated cases to the contrary,[32] but most courts have echoed the rationale espoused in *Brenden* and *Haas* in allowing the participation of qualified female students on interscholastic golf, tennis, track, and other noncontact teams that traditionally have been reserved for male students.[33]

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[27] *See* Bakke v. the University of California, 132 Cal. Rptr. 680, 553 P.2d 1152 (1976), *cert. granted,* 45 U.S.L.W. 3570 (No. 76-811, 1976-77 Term).

[28] 477 F.2d 1292 (8th Cir. 1973).

[29] The appeals court relied heavily on the reasoning offered in Reed v. Reed, 404 U.S. 71, 77 (1971). *See* text accompanying note 5, *supra.*

[30] *See* Oklahoma H. S. Athletic Ass'n v. Bray, 321 F.2d 269 (10th Cir. 1963); Louisiana H.S. Athletic Ass'n v. St. Augustine H.S., 396, F.2d 224 (5th Cir. 1968); Mitchell v. Louisiana H.S. Athletic Ass'n, 430 F.2d 1155 (5th Cir. 1970); Reed v. The Nebraska Sch. Activities Ass'n, 341 F. Supp. 258 (D.C. Neb. 1972).

[31] 289 N.E.2d 495 (Ind. 1972).

In a recent Colorado case, female students brought a class action suit challenging the constitutionality of a rule of the state athletic association which limited participation in soccer to male students.[34] The federal district court held that the complete denial of any opportunity for female students to play interscholastic soccer was a violation of their right to equal protection. Thus, the court presented the following options: discontinue soccer as an interscholastic sport, provide separate teams for males and females with substantially equal support and comparable programs, or permit both sexes to compete on the same team. The court concluded that there is no inherent right to a position on a school athletic team, but there is a right to have the opportunity to compete for a place on the team on equal terms.

Generally, courts have indicated that the existence of comparable women's athletic programs removes the necessity for providing 'mixed' teams due to the physiological differences between men and women that justify separate teams. The federal district court in Pennsylvania espoused this logic in upholding the 'separate but equal' doctrine for noncontact sports:

> The Court is convinced that the prime purpose behind the no-mix-sex competition rule is a valid one seeking to enhance the quality, quantity, and calibre of interscholastic sports opportunities for girls and boys in Pennsylvania. Male domination in the various sports activities is an historical fact in Pennsylvania schools prior to adoption of the 1970 rule. There is am-

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32. *See* Bucha v. Illinois H.S. Ass'n, 351 F. Supp. 69 (D.C. Ill. 1972), where the federal district court upheld the exclusion of two girls from the school's interscholastic swimming team on the basis of the state athletic association regulation barring coeducational competition. The court reasoned that the physical and psychological differences between the sexes were constitutionally sufficient reasons for prohibiting coeducational interscholastic competition among high school students.

33. *See* Gilpin v. Kansas State H.S. Activities Ass'n, 377 F. Supp. 1233 (D.C. Kan. 1973) (track team); Morris v. Michigan State Bd. of Educ., 472 F.2d 1207 (6th Cir. 1973) (tennis team).

34. Hoover v. Meiklejohn, 430 F. Supp. 164 (D.C. Colo. 1977).

> ple evidence that this is no longer the case. . . . Moreover, the rule has a rational basis in physiological and psychological differences which exist between males and females.[35]

In opposition to this view, the Sixth Circuit Court of Appeals held, in 1973, that female students must be permitted to participate with males in all noncontact interscholastic athletic activities even if teams for females are provided.[36] The court reasoned that no body contact is required on such teams so there is no justification for sex segregation on that basis. However, the appeals court recognized that the selection of members for competing teams on the basis of athletic ability is permissible.

These claims that qualified female students should be allowed to try out for traditionally male teams have been accompanied by allegations that qualified males should have similar opportunities to secure positions on teams reserved for women. An Indiana suit, challenging the participation of male students on the women's volleyball team, is presently being appealed to the state supreme court.[37] The case includes allegations that the male students are occupying places on the women's teams which should be reserved for females and that the coeducational teams have an advantage over the all-female teams in interscholastic competition. The lower court was not convinced by these arguments and upheld the right of male students to try out for the women's volleyball team if no separate team was provided for males.

Perhaps the most controversial issue in the athletic arena involves the participation of males and females together in contact sports.[38] To satisfy constitutional and statutory requirements, it has been assumed that either comparable sex-segregated activities must be provided or coeducational teams must be established. In several cases where no comparable teams in contact sports were available for girls, courts have ruled that female students must be allowed to try out for traditionally all-male teams. For example, the Washington Supreme Court mandated that two fully qualified female high school students must be allowed to compete on the interscholastic high school football team.[39] Similarly, the Supreme Court of Pennsylvania recently relied on the state's equal rights amendment in mandating that girls must be allowed to compete with boys in all contact sports, including football and wrestling.[40] Furthermore, the court noted that even if women's teams are available, female athletes are denied the opportunity to reach their potential when they are limited to playing on such teams.

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[35] Ritacco v. Norwin Sch. Dist., 361 F. Supp. 930 (W.D. Pa. 1973).

[36] Morris v. Michigan State Bd. of Educ., 472 F.2d 1207 (6th Cir. 1973).

[37] Brandstetter v. Indiana H.S. Athletic Ass'n, Civil No. 36828 (Hancock Circuit Court, 1976). Due to the fact that the Indiana High School Athletic Association recently changed its regulations to provide separate interscholastic volleyball competition for male students, the appeal may be declared moot.

[38] Also, the issue of girls playing on little league baseball teams is attracting judicial attention. In Fortin v. Darlington Little League, Inc., 514 F.2d 344 (1st Cir. 1975), the appeals court held that the exclusion of girls from little league was not rational because there was no evidence that girls, ages eight through twelve, could not compete successfully with males of comparable ages. Similarly, in Women v. Little League Baseball, Inc., 127 N.J. Super. 522, 318 A.2d 33 (1974), the New Jersey court concluded that girls must be allowed to participate in little league as baseball was no more dangerous for girls than for boys of the same age group. On the other hand, the federal district court in Pennsylvania upheld the exclusion of girls from little league as legitimate because baseball was a contact sport. Magill v. Avonworth Baseball Conference, 364 F. Supp. 1212 (W.D. Pa. 1973), *vacated*, 497 F.2d 921 (3rd Cir. 1974).

One other case involving high school athletics is worthy of note because it may be an example of the kind of allegations that will be raised in future litigation. In this case, *Cape v. Tennessee Secondary School Athletic Association*,[41] neither the legality nor the comparability of separate athletic teams was challenged. Instead, the female plaintiffs contested the use of different rules for women's basketball as denial of equal protection. In upholding the plaintiffs' claim, the federal district court recognized the legitimate purpose of protecting weaker, less capable student athletes by restricting them to half-court basketball, but concluded that some girls were both willing and able to play the more rigorous game prescribed for boys. Thus, the court found that the sex-based classification was not rationally related to the achievement of a legitimate educational purpose. However, the Sixth Circuit Court of Appeals recently overturned the district court's decision and held that the different rules for women's basketball were justified based on the physical differences between the sexes.[42]

From the diversity of issues presented in the above cases, it must be concluded that claims of sex-bias in athletics remain a fertile source of litigation. Although there is some consistency in judicial declarations that *equal opportunities* must be provided, there seems to be confusion as to what is meant by this term. The mere provision of separate, comparable teams for males and females may not withstand judicial scrutiny if female students can prove that they are not challenged by the program available to them or that they are qualified to participate on the teams reserved for male students. Although the notion of 'separate but equal' continues to receive support in legal controversies involving high school athletics, some recent cases have started to erode the vitality of this principle when applied to interscholastic sports, even contact sports. No doubt the United

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[39] Darrin v. Gould, 540 P.2d 882 (Wash. 1975).

[40] Pennsylvania v. Pennsylvania Interscholastic Athletic Ass'n, 334 A.2d 839 (Pa. 1975).

[41] 424 F. Supp. 732 (E.D. Tenn. 1976).

[42] Cape v. Tennessee Secondary Sch. Athletic Ass'n, No. 77-11-53 (6th Cir. Oct. 3, 1977).

States Supreme Court eventually will have to address this issue and take a stand on the nature of equality required for athletic programs to withstand judicial analysis.

PREGNANCY BENEFITS AND MATERNITY LEAVE POLICIES

Challenges of sex bias in employment practices have focused primarily on differential treatment of the sexes rather than on sex-segregation which has received attention in cases involving admissions policies and athletic programs. Instead of arguing that *equal* treatment is provided, employers are arguing that unequal treatment is justified. Many of these sex discrimination cases involving employment practices pertain to pregnancy benefits and maternity leave policies. In fact, the issue of employee disability benefits for pregnancy elicited two Supreme Court decisions within less than three years.

In *Geduldig v. Aiello*,[43] the Supreme Court upheld a California employee disability program that excluded pregnancy-related disabilities from its coverage as permissible under the equal protection clause of the fourteenth amendment. The Court found it unnecessary to decide which standard of scrutiny to employ in evaluating the legislation as it concluded that the classification used simply did not discriminate on the basis of gender. Noting that recipients of disability benefits were divided into groups, *i.e.*, pregnant women and nonpregnant persons, the Court reasoned that the classification in question was not sex-related because the second group contained both men and women:

> While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis. . . .[44]

Although this decision seemed to eliminate the federal constitutional issue in pregnancy benefit disputes, most legal commentators assumed that a program excluding pregnancy benefits would not withstand judicial analysis under Title VII of the Civil Rights Act of 1964 which prohibits sex discrimination in employment practices. Support for this position was supplied in *Washington v. Davis*[45] where the Supreme Court recognized that a more restrictive standard must be used in evaluating legislation under Title VII than is required for equal protection analysis. In addition, the agency charged with the administration of Title VII, the Equal Employment Opportunities Commission (EEOC), issued guidelines forbidding the exclusion of pregnancy from employee disability and sick leave programs.[46] Relying on Title VII and the EEOC guidelines, all seven federal circuit courts of appeals which considered the issue of discrimination based on pregnancy struck down the discriminatory policies.[47] For example, in *Wetzel v. Liberty Mutual Insurance Company,*[48] the Third Circuit Court of Appeals invalidated the exclusion of maternity benefits from an income protection plan and concluded that pregnancy should be treated on the same terms and conditions as any other temporary disability.

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[43] 417 U.S. 484 (1974).
[44] *Id.* at 496.

Despite the unanimity of judicial and administrative interpretation regarding Title VII protections, in 1976 the United States Supreme Court upheld the exclusion of pregnancy from a disability benefits plan as permissible under this law. In this case, *General Electric Company v. Gilbert,*[49] the Court's majority acknowledged that it previously had established different standards of judicial review for evaluating practices under the equal protection clause and Title VII. Nonetheless, Justice Rehnquist, speaking for the majority, relied heavily on the constitutional arguments: "*Geduldig* is precisely in point in its holding that an exclusion of pregnancy from a disability benefits plan providing general coverage is not a gender-based discrimination at all."[50] The majority noted the disparate effect of the the program, but concluded that it was facially nondiscriminatory because it covered the same categories of risks for both sexes. The majority reasoned that the parity of benefits accruing to both men and women is not destroyed simply because pregnancy is an additional risk unique to women. In addressing the direct conflict between the

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[45] 423 U.S. 820 (1976). *See* text accompanying note 111, *infra*, for a discussion of this case.

[46] 29 C.F.R. § 1604.10(b) (1976).

[47] Wetzel v. Liberty Mutual Insurance Co., 511 F.2d 199 (3rd Cir. 1975), *judgment vacated on other grounds*, 423 U.S. 816 (1976); Gilbert v. General Electric Corp., 519 F.2d 661 (4th Cir. 1975); Farkas v. South Western City Sch. Dist., 506 F.2d 1400 (6th Cir. 1975); Hutchinson v. Lake Oswego Sch. Dist., 519 F.2d 961 (9th Cir. 1975); Berg v. Richmond Unified Sch. Dist., 528 F.2d 1208 (9th Cir. 1975); Communications Workers v. A.T.&T., 513 F.2d 1024 (2d Cir. 1975); Tyler v. Vickery, 517 F.2d 1089 (5th Cir. 1975); Holthaus v. Compton & Sons, Inc., 514 F.2d 651 (8th Cir. 1975).

[48] 511 F.2d 199 (3rd Cir. 1975), *judgment vacated on other grounds*, 423 U.S. 816 (1976).

[49] 429 U.S. 125 (1976).

[50] *Id.* at 136.

EEOC guidelines and the company's benefit plan, the majority announced that such guidelines do not have the force of law.[51]

In his dissenting opinion, Justice Brennan questioned the majority's selection of a conceptual framework for the decision.[52] He noted that the majority focused on the disabilities *included* in the benefits plan and found that all of the risks included applied to both sexes. However, the plaintiffs and the EEOC examined the risks *excluded* and found that only women were subjected to a substantial risk resulting from the temporary disability of pregnancy. Brennan asserted that the majority erroneously reasoned that only gender-neutral risks were included in the program because prostatectomies, vasectomies, and circumcisions were also covered. Pregnancy was the only disability, sex-specific or otherwise, that was excluded.

Justice Stevens, also dissenting, admonished the majority for relying on *Geduldig* because he pointed out that plaintiffs must carry a heavier burden of proof in constitutional cases.[53] Furthermore, Stevens found the company's disability plan to be facially discriminatory since it placed pregnancy in a class by itself, and the capacity to become pregnant is the primary difference between males and females. In essence, Stevens raised the question: If discrimination based on pregnancy is not sex discrimination, then what is?

The response to *Gilbert* has been widespread, and criticism has come from various sources. One month after the decision, the Office for Civil Rights announced that Title IX regulations still require the inclusion of pregnancy in employee benefit programs and reiterated that such guidelines will be enforced.[54] The United States Senate has responded to *Gilbert* by passing an amendment to Title VII to clarify that prohibitions against sex discrimination include discrimination based on pregnancy or pregnancy-related disabilities.[55] In its endorsement of the amendment, the Senate Committee on Human Resources expressed strong disagreement with the holding in *Gilbert* and quoted both dissenting opinions.[56] The Senate Committee also rejected cost arguments which had been used by General Electric in justifying its exclusion of pregnancy benefits. This amendment is now before the House of Representatives and is receiving support from an unusual coalition of civil rights activists and anti-abortion conservatives.

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[51] Furthermore, the majority found support in an interpretive regulation issued by the Wage and Hour Administrator under the Equal Pay Act which states that if employer contributions to a plan are equal for both sexes, "no wage differential prohibited by the equal pay provisions will result from such payments, even though the benefits in question are greater for one sex than for the other." *Id.* at 140-141.

[52] *Id.* at 146 (Brennan, J., dissenting).

[53] *Id.* at 160 (Stevens, J., dissenting).

[54] Education Daily, Aug. 31, 1977, at 3.

[55] S. Rep. No. 331, 95th Cong., 1st Sess. (1977). On September 16, 1977, the Senate passed the amendment by a plurality of 75 to 11. Education Daily, Sept. 19, 1977, at 2.

Since the *Gilbert* case, courts in two states have reached decisions contrary to it based on provisions of state laws. In *Anderson v. Upper Bucks County Area Vocational Technical School*,[57] the Pennsylvania Commonwealth Court invalidated a collective bargaining agreement that excluded pregnancy benefits from its sick leave policy. The court found the policy to be in violation of the Pennsylvania Human Relations Act which requires temporary pregnancy-related disabilities to be treated in the same manner as any other disabilities. The court examined the *Gilbert* rationale, but found it unconvincing. Therefore, the court concluded that pregnancy-related disabilities constitute a sex classification and not a classification based only on disabilities.

Similarly, the New York Supreme Court, Appellate Division, rejected the *Gilbert* decision in interpreting the New York Disability Benefits Law and the Human Rights Law.[58] The court held that employment policies that single out pregnancy and childbirth for differential treatment from that accorded other instances of physical impairment or disability are prohibited under both state statutes. The court recognized the expense involved in eradicating sex discrimination but disagreed that sex bias could be allowed to persist simply because of economic reasons. Of significance, however, is the fact that dissenting opinions, citing *Gilbert* as the proper authority, were filed in both of these recent cases. Thus, the *Gilbert* principle that discrimination against pregnant women is not necessarily sex discrimination may be relied upon by other lower courts as they confront policies that disadvantage a subgroup of women.

Closely related to maternity disability benefit cases are the cases involving maternity leave policies. The constitutionality of compulsory maternity leave was addressed by the Supreme Court in 1974 in *Cleveland Board of Education v. LaFleur.*[59] In this case, the Court invalidated a school district's policy that required all pregnant teachers to take unpaid maternity leave at the beginning of their fifth month of pregnancy and prohibited them from returning to work until the beginning of the next regular semester after the child attained the age of three months. The Court concluded that such a regulation created an irrebuttable presumption that all pregnant teachers could not work beyond a certain point during pregnancy and could not return to work for a specified period of time. The Court reasoned that such determinations must be made on an individual basis in order to satisfy due process guarantees of the fourteenth amendment.

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[56] The Committee Report also quoted the EEOC Vice Chairperson who stated: "The Gilbert decision has left a gaping hole in the protection afforded by Title VII to women-discrimination on the basis of pregnancy continues to be a significant barrier to the equal participation of women in the labor market." Proposed amendments to Title VII: Hearings on S. 995 before the Subcomm. on Labor, 95th Cong., 1st Sess. 1 (1977) (statement of Ethel Bent Walsh, Vice Chairperson, Equal Employment Opportunity Commission). In addition, the Senate Report noted that 25 states interpret their state fair employment practice laws to prohibit sex discrimination based on pregnancy and childbirth.

[57] 373 A.2d 126 (Pa. Commw. Ct. 1977).

[58] Brooklyn Union Gas Co. v. N.Y. State Human Rights Appeal Board, 378 N.Y.S.2d 720, 50 A.2d 381 (App. Div. 1975).

Although LaFleur seemingly settled the constitutionality of compulsory maternity leave, this issue has been the focal point of several recent decisions. In *Condit v. United Airlines,*[60] a federal district court in Virginia upheld the airline's mandatory maternity leave policy on the rationale that pregnant stewardesses present an increase in risk of harm, "for it is enough to show that elimination of the hiring policy might jeopardize the life of one more person than might otherwise occur under the present ... practice."[61] The court emphasized that pregnant women are susceptible to cramps, fatigue, back strain, nausea, vomiting, and dangers of spontaneous abortion and hormonal changes. While admitting that not every pregnant woman will have these symptoms, the court justified a blanket policy because of the impossibility of predicting when and which women might be so inflicted. Thus, the court was not persuaded to follow the reasoning in *LaFleur* and allow stewardesses to continue to work while they had a physician's opinion that they were able to fulfill their duties. The court was not convinced that the universal policy in this case created the kind of sex stereotyping that Title VII was established to prevent. Consequently, the court concluded that the mandatory pregnancy leave policy was a legitimate safety precaution comparable to the policy requiring pilots to cease commercial flying at age 60.

An opposite conclusion was reached in *Gardner v. National Airlines,*[62] wherein the federal district court for southern Florida found that the airline's policy of requiring pregnant stewardesses to take unpaid maternity leave as soon as they became aware of their pregnancy constituted sex discrimination under Title VII. The court reasoned that compulsory maternity leave before the twentieth week of pregnancy could not be justified as a bona fide occupational qualification. The court cited *LaFleur* and concluded that it would be anomalous to approve of a compulsory leave policy under Title VII when a similar plan was invalidated under the Federal Constitution. Hence, the court reasoned that the judiciary would in effect be overruling *LaFleur* if it sanctioned the compulsory maternity leave regulation.

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[59] 414 U.S. 632 (1974).

[60] 45 U.S.L.W. 2178 (E.D. Va. 1976), *aff'd per curiam*, (1977) 4 Emp. Prac. Dec. (CCH) 7752.

[61] *Id.*

[62] 45 U.S.L.W. 2596 (S.D. Fla. 1977).

Another controversial issue in maternity leave disputes involves employees' rights to use sick leave for pregnancy-related disabilities. In *Zichy v. City of Philadelphia,*[63] the federal district court for eastern Pennsylvania invalidated a regulation that denied sick leave to employees who were disabled because of pregnancy or childbirth. The court reasoned that there was no rational basis for differential treatment of pregnancy from any other temporary disabilities. In another Pennsylvania case, the federal district court struck down a hospital's employee sick leave policy which prohibited pregnant employees from using accumulated sick leave prior to commencing a leave of absence.[64] However, the court noted that each individual's situation is different and that a woman is entitled to have the benefit of accumulated sick leave applied only to the time of actual disability.

Two cases, currently pending before the United States Supreme Court, should offer some guidance in the area of maternity leave policies. In *Berg v. Richmond Unified School District,*[65] the Ninth Circuit Court of Appeals invalidated a school district's maternity leave policy as violative of Title VII. The policy denied sick leave pay during pregnancy-occasioned absences and compelled pregnancy leave at the school board's discretion. The school board claimed that its maternity leave policy was outside the protections of Title VII and based its argument on the premise that the policy did not establish a sex-based classification since it was applicable only to pregnant women and not to all women. However, the appellate court was not persuaded to endorse this position and instead gave great deference to EEOC guidelines in striking down the policy. The court interpreted Title VII as requiring that employment policies involving the commencement and duration of leave must be applied to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

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[63] 392 F. Supp. 338 (E.D. Pa. 1975).

[64] EEOC v. Children's Hospital of Pittsburgh, (1976) 13 Empl. Prac. Dec. (CCH) 11,359. *See also* Hutchison v. Lake Oswego Sch. Dist. No. 7, 519 F.2d 961 (9th Cir. 1975); Matter of Board of Educ. of the City of N.Y. v. State Division of Human Rights, 35 N.Y.2d 675, 360 N.Y.S.2d 887, 319 N.E.2d 203 (1974).

[65] 528 F.2d 1208 (9th Cir. 1975), *cert. granted*, 45 U.S.L.W. 3508 (No. 75 536, 1977 Term).

In the second case pending before the Supreme Court, *Satty v. Nashville Gas Company*,[66] the Sixth Circuit Court of Appeals also held that the exclusion of normal pregnancy from a sick leave program constituted sex discrimination under Title VII. Satty, who was placed on pregnancy leave, lost her accumulated seniority for job bidding purposes and could not apply sick leave to her pregnancy-related absence. The appellate court awarded Satty the sick leave benefits that should have been paid during her maternity leave, back wages reduced by temporary wages and unemployment insurance, reinstatement with full seniority, and recovery of reasonable attorney fees. The court distinguished this case from the constitutional issue in *Geduldig* on the grounds that the question presented in *Satty* was whether the exclusion of pregnancy-related disabilities from a sick leave and seniority program violates a congressional enactment. The court did not interpret *Geduldig* as precluding "all future discussion of statutory interpretation under a relatively new act such as the Civil Rights Act of 1964."[67]

Although the appellate courts in both *Berg* and *Satty* showed great respect for EEOC guidelines, in light of the Supreme Court's dismissal of such guidelines in *Gilbert*, plaintiffs may have to amass new arguments in their appeals. The Supreme Court's final stance in these cases is expected to add some new dimensions to the pervasive *Gilbert* declaration and is certain to have implications for future litigation involving sex discrimination. If the Supreme Court reverses the two appellate courts, it will, in effect, be taking the position that pregnancy *is* a disability for purposes of compulsory maternity leave but *is not* a disability for purposes of sick leave and insurance benefits.

So as not to create an erroneously bleak picture regarding discriminatory practices against pregnant employees, it should be noted that female plaintiffs have found a receptive judicial forum when classifications based on pregnancy have been combined with classifications based on marital status. For example, in a Sixth Circuit case which has been widely publicized, the dismissal of an employee because she was pregnant and unmarried was challenged. In this case, *Martin Sweets Company v. Jacobs*,[68] the appeals court overturned the dismissal and the Supreme Court recently denied certiorari. The circuit court rejected the argument that the termination was lawful because expectant, unmarried male parents would be treated in the same fashion. Also, the employer failed to show that the classification had any rational relationship to the normal operation of the business. The appellate court disagreed that the employee's unmarried status removed her from protection under Title VII. Hence, the court concluded that the termination of unmarried, pregnant employees had a disparate and invidious impact upon women and created arbitrary and unnecessary barriers to employment in violation of Title VII.[69]

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[66] 522 F.2d 850 (6th Cir. 1975), *cert. granted*, 45 U.S.L.W. 3508 (No. 75-1069, 1977 Term).

[67] *Id.* 522 F.2d at 853. In a recent oral argument before the Supreme Court, attorneys for the Nashville Gas Company relied heavily on the argument that pregnancy is a voluntary condition and therefore distinct from other illnesses and injuries. 46 U.S.L.W. 3232 (October 11, 1977).

[68] 550 F.2d 364 (6th Cir. 1977), *cert. denied*, [1977] 14 Empl. Prac. Dec. (CCH) ¶ 7527.

Marital status also was challenged in connection with a pregnancy leave policy in Pennsylvania. In *Leechburg Area School District v. Human Relations Commission*,[70] the Pennsylvania Commonwealth Court struck down a pregnancy leave provision that made pregnancy leave applicable only to married teachers. The court reasoned that although facially differentiating between married and unmarried teachers, the policy had the effect of creating a "condition (marriage) precedent to the eligibility of an employee for disability leave which must only be met by female teachers. . . ."[71] As such, the court held that the regulation constituted unlawful sex discrimination.

One other decision regarding the rights of pregnant employees merits attention as this case involves the termination of an employee due to the individual's pregnant state. On July 27, 1977, in *Mitchell v. Board of Trustees of Pickens School District*,[72] a federal district court in South Carolina upheld the right of a school board to refuse to renew the contract of a pregnant teacher as soon as the board learned that the teacher would be absent for an extended period as a result of her pregnancy. The court relied on *Gilbert* in concluding that the school board did not violate Title VII by refusing to rehire a pregnant teacher. The board argued that its policy of not renewing the contract of any teacher with a foreseeable period of absence covered male teachers as well as female teachers. Even though the policy had been applied to only one physical disability, *i.e.*, pregnancy, the court reasoned that no gender-based discrimination was involved. The court declared that the board's policy was facially nondiscriminatory and thus permissible under Title VII.[73] It is too early to conclude that this case is typical of the progeny of *Gilbert*, but if upheld on appeal, this ruling will mean that not only can insurance benefits be denied to pregnant employees (as was sanctioned in *Gilbert*) but also pregnancy per se can be a valid reason for dismissing female employees.

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[69] *See* Andrew v. Drew Municipal Separate Sch. Dist., 507 F.2d 611 (5th Cir. 1975), *cert denied*, 423 U.S. 1085 (1976), where the Fifth Circuit Court of Appeals held that a rule prohibiting the hiring of parents of illegitimate children discriminated against women because mothers of illegitimate children are more easily detected than are fathers. The United States Supreme Court agreed to hear this case, but announced in June, 1976 that certiorari had been improvidently granted.

[70] 339 A.2d 850 (Pa. Commw. Ct. 1975).

[71] *Id.* at 853.

[72] Mitchell v. Board of Trustees of Pickens County Sch. Dist., 46 U.S.L.W. 1035 (D.S.C. 1977).

[73] *Id.* at 1035.

RETIREMENT BENEFITS PROGRAMS

Currently, allegations of sex discrimination are also receiving judicial attention in connection with retirement benefits programs. The use of separate actuarial tables for men and women has long been a common practice, but only recently has this sex-based distinction been attacked in the courts.

In *Reilly v. Robertson*,[74] the Indiana Supreme Court invalidated the use of separate actuarial tables as violating the equal protection clause of the fourteenth amendment, Title VII, and the Indiana Constitution. Noting that a sex-based classification must be reasonable and not arbitrary, and must have a fair and substantial relation to the object of the legislation, the court concluded that the shorter average life expectancy of males does not provide the necessary rational basis for classifying retired teachers by sex for purposes of retirement benefits. The court emphasized that sex is only one of the innumerable factors influencing life expectancy, and since the retirement plan in question did not consider other such factors, it resulted in differential benefits based solely on sex. The court also recognized that group mortality statistics ignore the traits of the individual female. Consequently, 82.9% of the females will have the same year of death as 82.9% of the males, but the females will die having received less in retirement benefits than the males.[75]

The court distinguished this case from the pregnancy benefits issue addressed in *Geduldig v. Aiello*.[76] In contrast to *Geduldig*, where there was no risk from which men were protected and women were not, in *Reilly* the provision of greater retirement payments to men gave men more protection "against risks arising from daily human needs."[77] In a concurring opinion, Justice Arterburn discussed the problems accompanying the use of mortality tables which are based on the entire population. He contended that such tables are inadequate guides because the differences in life expectancies are at least partially attributed to the fact that traditionally men have engaged in more hazardous, stressful occupations.[78]

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[74] [1976] 13 Empl. Prac. Dec. (CCH) ¶ 626, *cert. denied*, 46 U.S.L.W. 3180 (No. 76 1635, 1977-78 Term).

[75] *Id.* 13 Empl. Prac. Dec. at 7342.

[76] 417 U.S. 484 (1974).

[77] [1976] 13 Empl. Prac. Dec. (CCH) ¶ 626, at 7345.

[78] *Id.* at 7346 (Arterburn, J., concurring).

Without mortality tables indicating otherwise, Arterburn made the assumption that male and female teachers have the same life expectancies.

In *Manhart v. City of Los Angeles Department of Water and Power,*[79] the Ninth Circuit Court of Appeals reached a similar conclusion to the one reached by the Indiana Supreme Court in *Reilly*. In *Manhart*, the retirement plan required women employees to contribute 15% more to the program than similarly situated male employees because of the longer average life expectancy of women. The court held that such a policy was in violation of the anti-sex-bias provisions of Title VII. The court was not persuaded to endorse the argument that the classification constituted a bona fide occupational qualification.

It is somewhat difficult to reconcile the decision in *Manhart* with the Supreme Court's proclamations in *Geduldig* and *Gilbert*. In the latter cases, the Supreme Court held that disability benefits plans can rely on a classification based on pregnancy because such a classification, although only affecting women, is not sex-related. However, in *Manhart*, the classification based on longevity, which impacts differently on the two sexes, was declared to be unlawful sex discrimination. The court in *Manhart*, nonetheless, attempted to make a distinction between the two types of classifications. The court noted that the exclusion of pregnancy from a disability plan is not in itself sex discrimination because nonpregnant females are treated in the same fashion as are males. Conversely, the classification for retirement benefits is definitely sex-related as it disadvantages all women:

> A greater amount is deducted from the wages of every woman employee than from the wages of every man employee whose rate of pay is the same. How can it possibly be said that this discrimination is not based on sex?[80]

Also, the court noted that in *Gilbert* there was no risk in the disability program from which men were protected and women were not. However, in *Manhart*, the monthly benefit was the same for men and women, but the cost to women was higher than the cost to men. Thus, the appeals court concluded that the retirement benefits question could be distinguished from the pregnancy benefits issue, and the challenged plan in *Manhart* was facially discriminatory because it classified individuals on the basis of sex alone.

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[79] 553 F.2d 581 (9th Cir. 1976), *cert. granted*, 46 U.S.L.W. 3180 (No. 76-1810, 1977-78 Term).

[80] *Id.* at 593.

Due to the fact that the retirement benefits issue has not yet been addressed by the United States Supreme Court, only tenuous speculation can be made as to the precedential value of these lower court decisions. However, the arguments raised in these cases warrant attention as they may be used in subsequent litigation dealing with retirement benefits and other types of sex-based classifications in employment. Since the Supreme Court recently agreed to hear the *Manhart* case,[81] it will be faced with either treating classifications based on life expectancy like those based on pregnancy (as not being sex-related), or distinguishing the two types of classifications, thereby placing some restrictions on its sweeping *Gilbert* declaration.

PREREQUISITES TO EMPLOYMENT

In addition to disputes over employee benefits, job qualifications which have a disparate impact on women have been challenged in several recent cases. Employers have defended such occupational qualifications on the rationale that business necessity justifies sex-related characteristics for specific jobs. The EEOC, however, has narrowly interpreted *bona fide occupational qualifications* based on sex and accordingly, has scrutinized any prerequisites to employment that disadvantage either men or women.[82]

In 1971 the Supreme Court delivered an opinion in which a sex-based job qualification was invalidated due to the lack of business necessity for the regulation. In this case, *Phillips v. Martin Marietta Corporation*,[83] the company denied employment to women with pre-school age children while hiring men with such children. No evidence was presented to show that the condition in question had any reasonable relationship to the normal operation of the business. Thus, the proceedings were remanded for fuller development of the record and for additional consideration. Justice Marshall concurred in the remand but did not agree that a bona fide occupational qualification could be established by showing that some women with pre-school age children have family responsibilities that interfere with job performance while men do not usually have such responsibilities. Marshall cautioned that the "Court has fallen into the trap of assuming that Title VII permits ancient canards about the proper role of women to be a basis for discrimination."[84] He noted that "characterizations of the proper domestic roles of the sexes were not to serve as predicates for restricting employment opportunity. The exception for a 'bona fide occupational qualification' was not intended to swallow the rule."[85]

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[81] *Cert. granted*, 46 U.S.L.W. 3180 (No. 76-1810, 1977-78 Term).
[82] 29 EEOC Sex Discrimination Guidelines § 1604.2 (1976).
[83] 400 U.S. 542 (1971).
[84] *Id.* at 545 (Marshall, J., concurring).

More recently, the federal court for the middle district of Alabama struck down a sex-based classification for police officers because there was no evidence of a business necessity for the classification.[86] In this case, the Montgomery Police Department divided its police officers into two groups—patrolmen and policewomen. A policewoman was not allowed to perform general police work but rather was "restricted to performing 'such duties as may be assigned by her commanding officer which are best performed by a woman. . . .' "[87] The federal court found no justification for preventing women from doing patrol work and thus ordered the department to create a single entry level classification of 'police officer' open to all applicants without regard to sex.[88]

Job specifications that require certain physical characteristics for applicants also have been the source of litigation. In *United States v. City of Chicago*,[89] female plaintiffs challenged the city's regulation that all patrolmen must be at least five feet four inches tall. Such a requirement eliminated 65% of the women but only 7% of the men from the applicant pool. As no evidence was presented that the height requirement was related to job performance, the federal district court held that the policy established unlawful discrimination against women. Similarly, the imposition of a minimum weight requirement for employees engaged in assembly line work was invalidated by a federal district court in Kentucky on the grounds that there was no indication that a relationship existed between weight and any necessary job qualification.[90]

Despite the fact that bona fide occupational qualifications which disadvantage either sex are supposed to be narrowly construed and generally have been, several recent court decisions have sanctioned certain exceptions.[91] For example, in *Boyd v. Ozark Airlines*,[92] the federal district court endorsed a minimum height requirement for pilots. Female plaintiffs presented evidence that Ozark's height regulation had a disparate impact on women because the requirement that a pilot must be at least five feet seven inches tall eliminated almost 75% of the females but only 11% of the males in the possible applicant pool. Furthermore, plaintiffs were able to establish a prima facie case of sex discrimination because Ozark did not employ any women among its 380 pilots. Nonetheless, Ozark successfully rebutted the prima facie case of discrimination by substantiating a business necessity for a minimum height requirement. The evidence indicated that a pilot had to be at least five feet five inches tall in order to have free and unfettered use of all instruments within the cockpit and to maintain proper vision to pilot plane. Although upholding a height requirement as a necessary job qualification, the court did order Ozark to lower its standard to five feet five inches as the evidence indicated that pilots did not have to be any taller in order to perform their duties successfully.[93]

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[85] *Id.*

[86] Jordan v. Wright, 417 F. Supp. 42 (M.D. Ala. 1976).

[87] *Id.* at 44.

[88] *See* Anthony v. Massachusetts, 415 F. Supp. 485 (D. Mass. 1976), *judgment vacated sub nom.* Feeney v. Massachusetts, 46 U.S.L.W. 3240 (October 11, 1977), where the state's Veterans' Preference Statute was challenged due to its disparate impact on women. Anthony, a female lawyer, applied for a position in the Welfare Department and tied for the highest Civil Service exam score of any applicant. However, she was ranked behind 56 veterans (all men, 54 with lower scores) in the list of applicants for the position. The federal district court held that the statute served to discriminate against women in violation of the equal protection clause. Although the state's purpose to assist veterans was considered to be legitimate, the means selected to achieve this goal were inappropriate due to the dramatic negative impact on women. The district court declared that once the state provides public jobs, it must do so in a fair and equitable manner in order to satisfy equal protection guarantees. However, the United States Supreme Court recently vacated this decision without delivering an opinion.

[89] [1976] 11 Empl. Prac. Dec. (CCH) ¶ 10,597 (N.D. Ill.).

[90] Meadows v. Ford Motor Co., [1973] 5 Empl. Prac. Dec. (CCH) ¶ 8468 (D. Ky.).

Recently, in *Dothard v. Rawlinson*,[94] the Supreme Court delivered an opinion involving a minimum height and weight requirement for prison guards. Female applicants challenged these requirements in addition to a policy that restricted 'contact positions' (those requiring continual close proximity to inmates) in maximum security prisons to men. Since most of the guard jobs were classified as 'contact positions,' only 25% of the positions were open equally to women and men. Justice Stewart, writing for the majority, first addressed the height and weight requirements. The Supreme Court upheld the district court's finding that there was a prima facie case of discrimination because the combined height and weight restrictions excluded over 40% of the female population while excluding less than 1% of the male population.[95] In response to the argument that guards need strength for their duties, the Court majority suggested that prison officials should devise a strength test because a minimum height or weight does not necessarily imply strength.[96]

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[91] Courts have usually sanctioned reasonable appearance standards as bona fide occupational qualifications. For example, in Gerdom v. Continental Airlines, [1976] 13 Empl. Prac. Dec. (CCH) ¶ 11,320 (C.D. Cal.), a federal district court upheld maximum weight standards for flight attendants. The court emphasized that discrimination within the meaning of Title VII must be based on immutable characteristics or fundamental rights, and weight is not an immutable characteristic. Furthermore, the maintenance of any certain weight is not a fundamental right of an employee under the guarantees of Title VII. The court concluded that employers have the right to establish reasonable weight requirements, and the test is not whether the appearance standards can be easily met, but whether the standards are reasonable under the circumstances. *See also* Fagan v. National Cash Register Co., 481 F.2d 1115 (D.C. Cir. 1973); Willingham v. Macon Telegraph Publishing Co., 482 F.2d 535 (5th Cir. 1973); Bujel v. Borman Food Stores, Inc., 384 F. Supp. 141 (E.D. Mich. 1974); Baker v. California Land Title Co., 507 F.2d 895 (9th Cir. 1974); Greyhound Lines-West, Inc. v. Department of Industry, Labor, and Human Relations, (1975) 9 Empl. Prac. Dec. (CCH) 10,017 (Wis. Cir. Ct.).

[92] 419 F. Supp. 1061 (E.D. Mo. 1976). *See* Spurlock v. United Airlines, Inc., 475 F.2d 216, 219 (10th Cir. 1972).

[93] In Condit v. United Airlines, Inc., 45 U.S.L.W. 2178 (E.D. Va. 1976), *aff'd per curiam*,[1977] 4 Empl. Prac. Dec. (CCH) ¶ 7752, the reasoning offered in Boyd was followed. In *Condit*, the airline's mandatory maternity leave policy was upehld as a bona fide job qualification. In rendering its decision, the court noted that airlines have a serious obligation to take no chances regarding passenger safety. Due to the face that stewardesses are the only employees who evacuate passengers during emergencies, the court relied heavily on safety considerations in determining that the mandatory leave policy was justified as a business necessity. *See* text accompanying note 60. *supra*.

[94] 45 U.S.L.W. 4888 (1977).

Turning to the policy restricting 'contact positions' to males, the Court majority reached a different conclusion and found that such a requirement was a bona fide occupational qualification. Noting that Alabama prisons had been cited for their violence, Justice Stewart announed that the ability to maintain order in maximum security, unclassified prisons could be directly reduced by a "guard's womanhood."[97] Stewart also voiced concern over the possibility that sex offenders and other prisoners deprived of a heterosexual environment would be motivated to assault women if women were accessible.

Justice Marshall, joined by Justice Brennan, took issue with the majority's position regarding the denial of 'contact positions' to women. He noted the satisfactory performance of women in such positions in several other states. Also, he found the argument that contact positions are too dangerous for women to be in direct conflict with the intent of Title VII which is to allow individuals to decide for themselves whether a job is too dangerous.[98] Justice Marshall was most distressed, however, over the Court majority's demeaning attitude toward females. He admonished the majority for relying on the 'sexual assault' argument which simply "perpetuates the insidious old myths" of women as seductive sex objects. Additionally, Marshall noted that since one of the goals of the Alabama prison system is to eradicate prisoners' antisocial behavior, sex offenders would no doubt profit by learning to treat women guards properly.[99]

Diverse issues are being litigated under the broad umbrella of prerequisites to employment, and presently, it is difficult to discern exactly which conditions will be judicially sanctioned as bona fide occupational qualifications. Although prerequisites that blatantly disadvantage women and have no relationship to a business necessity are being struck down, some sex-based qualifications are being endorsed in situations where a relationship to job performance can be established. If the Supreme Court's reasoning in *Dothard* is indicative of its stance in future decisions, the list of sex-related bona fide occupational qualifications may expand. It is particularly disturbing to advocates of women's rights that in *Dothard* the Court seemed to retreat to old stereotypes regarding the role of women in reaching its conclusion that differential treatment of females in employment practices is not only legitimate, but also desirable.

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[95] *Id.* at 4891.

[96] In his concurring opinion, Justice Rehnquist contended that an employer could justify a height and weight requirement in situations where the 'appearance' of strength is necessary to job performance. *Id.* at 4893 (Rehnquist, J., concurring).

[97] *Id.* at 4892.

[98] *Id.* at 4893 (Marshall, J., dissenting).

[99] *Id.* at 4894.

TITLE IX JURISDICTIONAL ISSUES

Title VII of the Civil Rights Act of 1964 is not the only statutory source of litigation involving sex discrimination. Title IX of the Education Amendments of 1972,[100] which prohibits sex discrimination against beneficiaries of or participants in any educational program or activity receiving federal financial assistance, is also being used to challenge sex bias. Issues regarding the actual intent and breadth of this piece of legislation seem destined to evoke controversy in courtrooms for some time in the future.

The first case to confront the question of whether or not a private individual can bring suit under Title IX was *Cannon v. University of Chicago*,[101] In this case, the Seventh Circuit Court of Appeals held that there is no private right to sue under Title IX and thus an aggrieved individual must rely upon the administrative procedures provided by the Department of Health, Education, and Welfare (HEW). Although HEW has emphatically stated that a private right to sue was intended by the framers of Title IX, the appellate court reviewed the legislative history and concluded that Congress did not intend to create such a right. According to the appeals court, an individual might be able to bring a private action if his or her administrative claim with HEW were rejected, but not before then. The Seventh Circuit Appellate Court did agree to rehear *Cannon* one year after the original decision, and it reached a similar conclusion the second time. Petition for a third rehearing has been filed, and if not successful, attorneys for the plaintiff plan to appeal the decision to the United States Supreme Court.[102]

In 1976, a federal district court in Ohio delivered a decision in opposition to *Cannon*. In *Piascik v. Cleveland Museum of Art*,[103] a female applied for the position of security guard at the museum and alleged that she was denied employment because of her sex. Initially, the court had to determine whether the museum was covered by the mandates of Title IX. Noting that the museum received federal funds for an educational program which it operated in conjunction with a local school system and that its curators performed teaching functions, the court concluded that the museum was covered by Title IX. The court made this determination in spite of the fact that no federal monies were used in the employment of security guards. In contrast to the court's reasoning in *Cannon*, the court in *Piascik* held that the individual did have a private right to sue because without such a right, disadvantaged citizens would be left with no effective remedy for the redress of grievances. As yet, this case has not been appealed and stands as a direct contradiction to the *Cannon* decision. It appears that this issue will remain unsettled until the United States Supreme Court delivers an opinion clarifying an individual's right to sue under Title IX.

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[100] 20 U.S.C. § 1681 (Supp. V 1975).

[101] [1976] 12 Empl. Prac. Dec. (CCH) ¶ 11175 (7th Cir.), *aff'd on rehearing*, [1977] 14 Empl. Prac. Dec. (CCH) ¶ 7770 (7th Cir.).

[102] Education Daily, Sep't. 6, 1977, at 3.

[103] 426 F. Supp. 779 (E.D. Ohio, 1976). Although the court upheld Piascik's private right to sue under Title IX, it concluded that she was not a victim of sex discrimination.

A more basic question, which is the source of current debate, is whether Title IX protections extend to educational employees or whether they cover only students. This question was addressed by a Michigan federal district court in the case of *Romeo Community Schools v. HEW.*[104] Judge Fiekens, speaking for the federal court, created a wave of reaction by his declaration that Title IX addresses itself only to sex discrimination against students, the direct beneficiaries of federal assistance, and does not cover teachers or other school employees. The court admonished HEW for establishing regulations beyond its scope of authority and declared that the Title IX regulations dealing with employment were of no legal force. The court stated that HEW has the power to terminate federal assistance only to the particular program, or part thereof, where discrimination is uncovered. Thus, enforcement of Title IX must be program specific, and employment practices are "inherently non-program specific."[105] In short, the *Romeo* court reasoned that discriminatory practices must be directly traced to federal dollars in order for Title IX protections to be adjudged abridged.

Very recently, a Kansas federal court delivered an opinion contrary to *Romeo*. In *McCarthy v. Burkholder,*[106] the court was asked to dismiss a suit brought by a teacher who claimed that she was twice denied maternity sick leave benefits in violation of Title IX. Using the reasoning outlined in *Romeo*, attorneys for the school board asserted that HEW has no authority under Title IX to regulate employment practices. The federal court, however, reviewed records of the congressional debate on Title IX and concluded that the law was intended to eliminate unjustified discrimination in all phases of education, including employment. However, the court has delayed its decision on whether Title IX coverage is limited to those employees in federally assisted programs or applies to all staff members in school districts receiving federal funds.

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[104] 14 Fair Empl. Prac. Cas. (BNA) 1177.
[105] *Id.* at 1186.
[106] Education Daily, Aug. 31, 1977, at 4.

The final outcome in the *Romeo/McCarthy* conflict has implications for litigation far beyond the original issues posed in these cases. If the *Romeo* position is endorsed and Title IX regulations relating to employment practices are invalidated as an excessive use of statutory power, the vitality of Title IX as a tool to attack sex bias will be greatly reduced. Furthermore, such a judicial stance could encourage a narrow interpretation of other civil rights legislation, resulting in the additional erosion of HEW's power to enforce implementation regulations.

Due to the lack of agreement among lower courts as to the breadth of Title IX, at present, one can only speculate as to the potency of this law in reducing sex discrimination in education. The litigation involving Title IX is in its formative stage, and most of the cases to date still involve procedural issues rather than substantive questions. Undoubtedly, such matters as pregnancy leave, dress codes, course offerings, and athletic scholarships will be addressed as additional courts begin to grapple with the parameters of Title IX protections.

FUTURE DIRECTIONS

Although attempting to assess the judiciary's posture in sex discrimination litigation is somewhat analagous to shooting at a moving target, it appears that if courts maintain their present course, the outlook for women's rights is not particularly bright. The current Supreme Court has indicated a reluctance to expand its interpretation of the protections covered by the Federal Constitution and is very unlikely to deem sex a 'suspect class' for purposes of equal protection review. The fact that sex is an immutable characteristic over which the individual has no control has not persuaded the Court to afford sex-based classifications the same degree of constitutional protection offered to other inherent characteristics such as race, illegitimacy, and national origin. Indeed, the Burger Court does not view women as comprising a politically powerless, vulnerable minority and has accepted the premise that differences between the sexes justify differential treatment under law.

While judicial declarations indicate adherence to the 'separate but equal' doctrine in sex discrimination cases,[107] the degree of 'equality' required remains obscure. Standards used to evaluate the impartiality of treatment afforded the sexes seem to fluctuate according to judicial mood. Recent Supreme Court decisions appear to have contrasted legal protections afforded women vis-a-vis employment practices.[108] Some advocates of women's rights contend that the Court is moving alarmingly close to endorsing a doctrine of 'separate but *unequal*' treatment—a reversion to pre-*Plessy v. Ferguson*[109] days—in cases involving sex discrimination in employment.

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[107] Similar arguments to those used in pre-*Brown* desegregation cases are being resurrected to challenge sex segregation in school athletic and academic programs as 'inherently unequal', but these allegations have not yet received judicial endorsement. However, if the

Although civil rights activists have turned to federal statutory provisions in hopes of gaining greater relief than is currently possible when basing challenges solely on federal constitutional guarantees, there is meager evidence that this approach will provide acceptable remedies. The Supreme Court recently has interpreted civil rights statutes as narrowly as possible, thereby limiting, rather than expanding, the protections afforded to citizens under these acts. Furthermore, little deference is being given to federal agency regulations in deciding cases.[110]

It is obvious that the judiciary's posture in sex discrimination litigation cannot be divorced from its stance in addressing all types of discrimination. It may be that the creation and demise of a theory of discrimination has taken place within the past six years. In 1971, the Supreme Court articulated the 'disparate impact' principle for evaluating the legality of policies under Title VII of the Civil Rights Act of 1964. In *Griggs v. Duke Power Company*,[111] a case involving racial discrimination in employment, the Court declared that proof of intent was not necessary to establish unlawful discrimination. According to the Court in *Griggs*, Congress directed Title VII "to the *consequences* of employment practices, not simply the motivation."[112] Thus, practices with a disparate im-

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courts find themselves in the untenable roles of giant accrediting agencies, attempting to assess the equality of all educational offerings for male and female students, the Supreme Court may be forced to take a more definitive stand as to the over-all legality of sex segregation in educational programs and activities.

[108] Possibly, the cases involving maternity leave benefits and retirement benefits that are currently pending before the Supreme Court will provide some clarification as to the scope of remedies available to women who are challenging discriminatory employment practices. *See* text with notes 65, 79 *supra*.

[109] 164 U.S. 537 (1896). In this case, the Supreme Court articulated the 'separate but equal' doctrine which reigned in racial discrimination cases until overturned in Brown v. Board of Educ., 347 U.S. 483 (1954).

[110] *See* General Electric Company v. Gilbert, 429 U.S. 125 (1976).

[111] 401 U.S. 424 (1971). In this case, the Supreme Court invalidated a policy that required job applicants to hold a high school diploma and pass two aptitude tests as prerequisites to employment because such requirements had a disparate impact on black applicants. Furthermore, there was no evidence that such requirements had a demonstrable relationship to job performance. The Court emphasized that Title VII applied not only to overt discrimination but also to practices that are fair in form, but discriminatory in operation. *Id.* at 431.

[112] *Id.* at 432.

pact on a protected class had to be accompanied by evidence that they were necessary to job performance in order to withstand judicial scrutiny under Title VII.

The 'disparate impact' theory, although grounded in Title VII, began to influence constitutional litigation as well. However, this development came to a halt in 1976 with the Supreme Court's decision in *Washington v. Davis*,[113] another case involving racial discrimination. While recognizing the *Griggs* principle the Court majority in *Davis* emphatically stated that evidence of a disparate impact alone will not evoke constitutional guarantees. Aggrieved individuals must also show that the challenged policy is an intentional device to disadvantage a protected class. Hence, a disproportionate impact must be accompanied by unlawful motive in order to abridge the United States Constitution.

Even though the Supreme Court continues to affirm its allegiance to *Griggs* for statutory review, its recent decision in *General Electric Company v. Gilbert*[114] indicates that the constitutional principle is influencing judicial analysis of alleged discriminatory practices under Title VII. The challenge in *Gilbert* was based on Title VII grounds, but nonetheless, the Court relied heavily on the constitutional arguments in upholding a disability benefits policy with a disproportionate impact on women. Therefore, it appears that the Supreme Court has traveled a complete circle, renouncing the 'disparate impact' doctrine for constitutional analysis and substantially eroding its potency for statutory review. How far the courts will carry this line of logic remains to be gleaned from the progeny of *Davis* and *Gilbert*, but it seems likely that the Supreme Court will continue to limit the scope of federal protections and thus force individuals to seek relief from discriminatory practices under state constitutional and statutory provisions. It may be that litigation involving sex discrimination is part of a more global legal phenomenon signaling judicial retrenchment from the activist Warren Court era. Indeed, this decade may be witnessing the emergency of a new definition of discrimination.

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[113] 96 S. Ct. 2040 (1976). In this case, the use of a written exam to determine eligibility for employment was upheld even though the practice excluded a disproportionately high number of black applicants. Justice White, writing for the majority, stated: "But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact." *Id.* at 2047.

[114] 429 U.S. 125 (1976). *See* text accompanying note 49, *supra*.

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Reverse Discrimination: Recent Cases

August W. Steinhilber
Assistant Executive Director
National School Boards Association
President, NOLPE

INTRODUCTION

The arena of civil rights has always been a volatile one and at times a violent one. The current situation is no different, but now a major portion of the concern centers on the rights of the majority. As more and more non-minority individuals bring civil rights actions charging discrimination because of a preference given to a minority, voices will be raised by advocates from one side or the other. One need only look at the current rhetoric and/or action for ample evidence of emotionalism.

Rhetoric: Reverse discrimination is discrimination. Affirmative action is necessary. Desegregation and integration are not the same. Goals are the same as quotas. We must stamp out all forms of arbitrary and invidious discrimination. Ability counts, not race. Preferential treatment is the only way of erasing the sins of the past.

Action/Pressure: The U.S. Supreme Court was picketed by minority persons carrying signs that read "Defend special admissions." The U.S. Commission on Civil Rights issued its "Statement on Affirmative Action" on the eve of the Court hearing of the *Bakke* case.[1]

Let us look at some of the players in this drama:

Griffin Bell	- The Attorney General whose background is Southern.
Wade McCree	- The Solicitor General who also happens to be Black.

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[1] Bakke v. Regents of Univ. of Cal., 553 P.2d 1152 (Cal. 1976), *cert. granted*, 97 S. Ct. 1098.

Archibald Cox	- Former Solicitor General now representing the University of California at Davis.
National Education Association	- Amicus curiae supporting affirmative action.
American Federation of Teachers	- Amicus curiae supporting Bakke.
American Jewish Committee	- Amicus curiae supporting Bakke.
Marco DeFunis	- Now a lawyer and amicus curiae, but once brought an action on his own behalf challenging a law school's admission policies.

BRIEF HISTORY

The beginning of this legal battle could very well start with Mr. Justice Harland's dissent in *Plessy v. Ferguson*[2] in which he made his famous comment that the Constitution is color blind:

> But in the view of the Constitution, in the eye of the law, there is in this country no superior, dominant ruling class of citizens. There is no caste here. Our Constitution is color-blind and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. . . . The law regards man as man and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land is involved.

Nearly 60 years later, the U.S. Supreme Court, in *Brown v. Board of Education*,[3] overturned *Plessy*, but instead of adopting Mr. Justice Harland's language, used the phrase "separate educational facilities are inherently unequal."

Freedom of choice desegregation plans became the vogue in the South. Desegregation was slow, if not non-existent, and emphasis was placed on the word "deliberate" when referring to the judicial mandate to desegregate with all deliberate speed.[4]

The courts, one by one, circuit by circuit, began tightening the restrictions and by 1968, the U.S. Supreme Court concluded that merely eliminating past practices may not be enough and an affirmative plan for desegregation may be necessary.[5] In the case of *North Carolina Board of Education v. Swann*,[6] the Court said, "Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy."

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[2] 163 U.S. 537, 559 (1896).

[3] 347 U.S. 483 (1954).

[4] Brown v. Board of Educ., 349 U.S. 294 (1955).

The U.S. Supreme Court opinion in *Swann v. Charlotte-Mecklenburg Board of Education*[7] is used by all sides in the discussion of reverse discrimination. On one hand, it is true that the U.S. Supreme Court did grant wide authority to federal district courts to fashion desegregation remedies. On the other hand, the Court did say that "[i]f we were to read the holding of the District Court to require as a matter of substantive constitutional rights, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obligated to reverse".[8]

When proponents of reverse discrimination causes quote the Court, they also refer to *Mathews v. Lucas*[9] in which the Court said: "Race bears no relationship to the individual's ability to participate in and contribute to society."[10]

In the meantime, lower federal courts had been affirming affirmative action programs.[11]

It must also be remembered that ten years after *Brown I*,[12] the Congress passed the Civil Rights Act of 1964.[13] Of particular note is Title VI of this law which reads:

> No person in the United States shall on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program actively receiving federal financial assistance.

Just in passing, it should be pointed out that the federal government is extensively involved in affirmative action requirements through the regulatory process.[14] However, I need not not refer to these in developing the legal arguments.

LEGAL THEORY

The fourteenth amendment to the United States Constitution does not require everyone to be treated identically. The Constitution permits states to use reasonable classifications at their option. Tax laws are obvious examples of the constitutionality of classifications. Property, wages, and goods are taxed differently and those differences are more often than not constitutional. A state only need show that the classification system has a reasonable basis for it to be upheld. The plaintiff must then bear the burden of proving that the classification is unreasonable, arbitrary and capricious.

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[5] Green v. County Sch. Bd., 391 U.S. 430 (1968).

[6] 402 U.S. 43, 46 (1971).

[7] 402 U.S. 1 (1971).

[8] *Id.* at 24.

[9] 427 U.S. 495 (1976).

[10] *Id.* at 505.

[11] *See* Associated General Contractors v. Altshuler, 490 F.2d 9 (1st Cir. 1973); Contractors Ass'n. v. Secretary of Labor, 442 F.2d 159 (3rd Cir. 1971).

[12] Brown v. Board of Education, 347 U.S. 483 (1954).

[13] 42 U.S.C. §§1971, 1975a-1975d, 2000a-2000h-6; 28 U.S.C. § 1447 (1970).

[14] *See* Exec. Order No. 11246, 3 C.F.R. 169 (1974) and 45 C.F.R. §80 (1977).

However, once a state government (which also means a local government) becomes involved in a suspect classification, the courts have developed a different standard by which to judge constitutionality. In legal jargon, the burden of proof shifts to the defendant. No longer is the plaintiff required to come forward with the evidence. Instead, the state must demonstrate that it is absolutely necessary for the classification to be maintained because of compelling state interest. Indeed, the standard is tough. How does one show an absolute necessity? What is a compelling state interest as compared to merely an important state interest?

Race is a suspect classification and no state has ever been able to meet the strict standard test when race has been at issue. The Supreme Court has never upheld a state's use of race as a classification. In a number of cases, however, the Court has said that once someone's constitutional rights have been violated, the remedy should take race into consideration.

The following cases will provide an overview before proceeding to the *Bakke* case:

Flanagan v. President and Directors of Georgetown University.[15] At issue in this case is the legality of Georgetown University Law School's minority financial assistance program. In 1972, the Law Center at Georgetown University set aside 60 percent of the available scholarship funds for minority students and 40 percent for non-minority students. The plaintiff, a white Caucasian student, entered the law school in September, 1973 and applied for scholarship aid. Although he demonstrated financial need in the amount of $2,700, he received only $400 in direct assistance from the University. Three other students had indicated less need than the plaintiff and had received nearly $2,000 in scholarship funds based on the fact that they were minority students. The plaintiff filed this action seeking a permanent injunction against alleged discrimination and seeking $3,700 in damages, representing the amount of financial aid he would have received had he not been subject to the alleged discrimination. The plaintiff alleged that the practices of the University were, in fact, in violation of Title VI of the Civil Rights Act of 1964 and the Department of HEW regulations,[16] which read in part:

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[15] 417 F. Supp. 377 (D.D.C. 1976).

[16] 45 C.F.R. §80.3(b)(1) (1977).

> A recipient under any program to which this subpart applies may not, directly or through contractual or other arrangements, on the ground of race, color, or national origin: (iii) subject an individual to segregation or separate treatment in any matter related to his receipt of any service, financial aid or other benefit under the program; . . .
>
> V. Treat any individual differently from others in determining whether he has satified any admission, enrollment, quota, eligibility, membership or other requirement, or condition which individuals must meet in order to be provided any service, financial aid, or other benefit provided under the program.

The University defended itself on four grounds. First, it argued that the plaintiff had failed to demonstrate that the classification of first year students as either minority or non-minority is discrimination on the basis of race as prohibited by Title VI. Second, the defendant asserted that the plaintiff had failed to demonstrate that the Law Center had received substantial enough financial assistance from the federal government to bring its action within the purview of Title VI. Third, the defendant asserted that its financial policies are a bona fide affirmative action program to increase minority enrollment at the Law Center, and, therefore, are not in violation of Title VI. And last, the defendants asserted that even assuming plaintiff was discriminated against, he had not been damaged by such discrimination, and the lack of actual damages defeats plaintiff's cause of action under Title VI.

U.S. District Court Judge Oliver Gash reviewed each of the University's defenses. With respect to the question of a minority classification, he noted that in a faculty resolution in 1972, the University had defined minority students as Native Americans (*i.e.*, American Indians), Chicanos, Puerto Ricans, Afro-Americans, and Asian-Americans. White Caucasian students were specifically excluded from the classification. While it is true that the University had a specific minority status that could include socially, economically and culturally disadvantaged white students, no such white students had ever qualified for minority status. The judge therefore ruled that with respect to classification, it was indeed the type prohibited by Title VI as well as the U.S. Constitution.

Turning to the question of federal financial assistance, the court noted that Georgetown Law School received over $7 million in federal aid to construct the Law School itself. While it is true that there were no federal funds in the challenged scholarship program, the University nevertheless signed an agreement relating to the receipt of federal financial aid. The assurance specifically said that there would be no discrimination within the University as a condition for receiving federal aid. Therefore, the court rejected the notion that discrimination relating to private funds could somehow take the University outside the purview of Title VI.

The court next turned to the question of past discrimination, and whether or not a bona fide affirmative action program was justified. The court noted that the defendants had never been found guilty of any past discrimination and, as a result, had no legal duty to correct any previous misdeed. Therefore, the University could not defend on the grounds that affirmative action was legally required.

The court finally turned to the question of damages. The University had argued that even assuming discrimination was involved, the plaintiff must, nevertheless, prove that such discrimination adversely affected him. In other words, the defendants asserted that the plaintiff must prove that *but for* the existence of the discriminatory financial aid policy, he would have received the direct sum in excess of the amount of the direct university scholarship aid he actually received. The court rejected this argument on the grounds that the plaintiff's burden need not extend to that degree but is met by merely showing that there was discrimination. The court stated that it will not allow such a wrong to escape judicial action because of the complexities of the defendant's admission procedures.

Associated General Contractors v. San Francisco Unified School District.[17] In this case, the school board passed a resolution relating to school construction projects. Specifically, the resolution said that construction projects costing $100,000 or more will be awarded to general contractors who employ non-white-owned businesses for at least 25 percent of the subcontracts. Any general contractor who submits a bid that does not meet that 25 percent requirement will not be considered a responsible bidder and will not be awarded the contract unless he or she establishes at a hearing that all possible measures had been taken to comply with the 25 percent requirement and the failure to comply was not the bidder's fault.

The plaintiffs in the case were associations of general contractors and subcontractors and individual contractors and subcontractors. None of the plaintiffs is a non-white-owned business. Intervening in the case were the National Association of Minority Contractors and the Minority Contractors Association of Northern California.

The history of the case begins in 1966 when the San Francisco city supervisors adopted an ordinance requiring affirmative action nondiscrimination practices in awarding all city contracts. In 1968, the school board adopted a similar provision with respect to its contracts. Nevertheless, minority contractors received only about 5 percent of the school district's contracts from 1968 to 1975 when the school district adopted a policy requiring 25 percent minority participation. Immediately thereafter, the percentage of dollar awards to minority contractors rose to over 33 percent.

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[17] 431 F. Supp. 854 (N.D.Cal. 1977)

The board concluded that its affirmative action policy was necessary to assure that discrimination against non-white firms is not perpetuated in the district's construction program, and to overcome the historic unwillingness of white business firms to participate in joint business ventures with non-white firms.

The legal question presented to the U.S. District Court was simple. Does the board have legal authority to proclaim and carry out the affirmative action policy? In short, this case does not involve the 14th amendment to the U.S. Constitution, nor does it involve Title VI of the Civil Rights Act. It merely questions the authority of a school board to pass an affirmative action policy. With this in mind, the U.S. District Court had to look at California law and the authority of school districts under California Law. The court noted that there is no doubt that the state of California, itself, could require an affirmative action policy, but to say that the state legislature has such authority does not say that the San Francisco Board of Education has the authority beyond what is expressly granted to it in statutory enactments related to the operations of public schools.

The board claimed that the state legislature had given it authority to lay down the affirmative action policy under Section 15951 of the California Education Code, which reads as follows: "the governing board of any school district shall let any contracts involved in an expenditure of more than $5,000 for work to be done or more than $8,000 for materials or supplies to be furnished, sold or leased to the district to the lowest responsible bidder who shall give such security as the board requires."[18] The board contended that it has the authority to define the word "responsible" when the legislature refers to "lowest responsible bidder," and any contractor who does not involve at least 25 percent minority subcontractors is not "responsible."

The court rejected the board's analysis and noted that it is one thing to say that the bidder is not responsible if the bidder is unwilling to comply with state law and engages in discriminatory practices, but it is quite another thing to say that the board can declare a social policy and then categorize a bidder as unresponsible for failing to comply with a policy that transcends the authority of the board. The court concluded that the board lacks the necessary legislative authority to impose the affirmative action policy even though the policy serves a desirable social purpose. The board must go to the California legislature or to the electorate, through the initiative process, for authorization.

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[18] Cal. Educ. Code §15951 (West 1969).

United Jewish Organizations of Williamsburgh v. Carey, [19] this case involves the application of a Voting Rights Act which prohibits discrimination and the action of the New York legislature in implementing the Act. The Act, which is designed to protect the voting rights of minorities, has a triggering mechanism which comes into play when a certain set of facts occur within a political area. When these facts do come into play, it is the responsibility of the proper state officials, working together with the U.S. Department of Justice, to come up with a reapportionnment plan. In this particular case, Kings County (New York), Manhattan, and the Bronx became subject to the Act triggered by the facts that they had a literacy test as a condition to vote, and less than 50 percent of their voting age residents voted in the presidential election of 1968. As a result, the U.S. Attorney General ruled that there must be a reapportionment plan. He further noted that these counties were racially polarized, and voting lines had the purpose and effect of diluting the vote of non-white individuals. After much negotiation with the Justice Department, a reapportionment plan was approved by the state legislature. As a result of this reapportionment plan, a Jewish community was divided into two senatorial districts and two assembly districts. Within these new districts, the Jewish community found that the voting population was 65 percent non-white. The Jewish organizations argued that the New York legislature, although seeking to comply with the Voting Rights Act as construed by the Attorney General, had nevertheless violated the 14th and 15th amendments by deliberately revising and devising its reapportionment plan along racial lines. The plaintiff organizations raised four specific objections. First, whatever might be true in other contexts, the use of racial criteria in redistricting and apportionment is never permissible. Second, that even if racial discrimination may be used to redraw district lines in order to remedy the residential effects of past unconstitutional reapportionment, there are no findings here of prior discrimination. Third, that the use of racial quotas in redistricting is never acceptable. And fourth, that even if the foregoing general propositions are infirm, what New York actually did in this case was unconstitutional.

Mr. Justice White wrote the opinion. It should be noted that Mr. Justice Brennan concurred in part and filed a separate opinion. Mr. Justice Stewart and Mr. Justice Powell filed concurring opinions. Mr. Justice Douglas and Mr. Justice Burger dissented and Mr. Justice Marshall took no part in the consideration of the case. The majority opinion noted that the triggering mechanism in this case was an uncommon use of congressional power. Nevertheless, the mechanism itself was constitutional. The court referred to its decision in *Beer v. U.S.*[20] In the *Beer* case, a

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19. 97 S. Ct. 996 (1977).
20. 425 U.S. 130 (1976).

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Voting Rights Act was upheld and the Court noted that the Act does not permit the implementation of a reapportionment plan that would lead to a regression in the position of racial minorities with respect to their effective exercise of the electoral franchise. The particular plan that was held constitutional by the Court in *Beer* involved reapportionment in the City of New Orleans creating one councilmanic district with a majority of black voters where no such majority of minority voters had ever existed before in any one district.

Such a law had similarly been upheld in *Richmond v. United States*[21] when city boundaries had been extended to dilute the voting power of minorities. In the *Carey* case, the Court upheld the reapportionment in New York saying, "In the absence of any evidence regarding non-white voting strength under the 1966 apportionment, the creation of substantial non-white majorities in approximately 30% of the senate and assembly districts in Kings County was reasonably related to the constitutionally valid statutory mandate of maintaining non-white voting strength."[22] The Court went on to note that the petitioners had not shown that the State of New York did more than accede to the position taken by the Attorney General as authorized by the constitutionally permissive language of the federal law. The Court further pointed out that there was no fencing out of the White population from participating in the political processes of the County and the plan did not minimize or unfairly cancel out white voting strength. There is evidence in the opinion that the Court was also concerned about whether it should enter into a basically political issue. It quoted from a previous case as follows: "But neither we nor the district courts have constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through redistricting, provide a rough sort of proportional representation in the legislative halls of the State."[23]

Mr. Justice Brennan concurred in part. He noted, however, that because this case carried the Court further down the road of race-centered remedies, he thought it appropriate, indeed, necessary, for him to present some specific remarks. He noted that it is a settled principle of law that all remedial uses of race are not forbidden. He would use a three part test in determining the constitutional or unconstitutional use of race. First, a purported preferential race assignment may, in fact, disguise a policy that perpetuates disadvantageous treatment of the plan's beneficiaries. Accordingly, he contended, that courts must look behind the use of race. Second, even in the pursuit of remedial objectives, an explicit policy of assignment by race may serve to stimulate our society's latent racial consciousness suggesting the utility and propriety of basing decisions on a factor that ideally bears no relationship to an individual's worth or need. Third, especially when interpreting the broad principles embraced by the equal protection clause, we cannot ignore the social reality that even a benign policy of assignment by race is viewed as unjust by many in our society, especially by those individuals who are adversely affected by the given classification. After going through this review, Mr. Justice Brennan said, "In my view, if and when a decisionmaker embarks on a policy of benign racial sorting, he must weigh the concerns that I've discussed against the need for effective social policies promoting racial justice in a society beset by deep-rooted racial inequities. But I believe that Congress here adequately struck that balance. . . ."[24]

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[21] 422 U.S. 358 (1975).

[22] United Jewish Organizations of Williamsburgh v. Carey, 97 S. Ct. 996, 1009 (1977).

[23] Gaffney v. Cummings, 412 U.S. 735, 754 (1973).

Mr. Justice Stewart and Mr. Justice Powell in affirming the decision of the Court, noted that the plaintiff organizations, having failed to show that the legislative reapportionment plan had either the purpose or effect of discriminating against them on the basis of facts, had afforded the Court no basis for constitutional relief.

Chief Justice Burger dissented. In his opinion, the New York legislature, in drawing reapportionment plans in 1974, did not consider racial composition as merely one of several political characteristics but had, on the contrary, considered race the one and only criteria. The Chief Justice also noted the following:

> The result reached by the Court today in the name of the Voting Rights Act is ironic. The use of a mathematical formula tends to sustain the existence of ghettos by promoting the notion that political clout is to be gained or maintained by marshalling particular racial, ethnic or religious groups in enclaves. It suggests to the voter that only a candidate of the same race, religion, or ethnic origins can properly represent that voter's interests, and that such candidate can be elected only from a district with a sufficient minority concentration. The device employed by the State of New York and endorsed by this Court today, moves us one step farther away from a truly homogeneous society. This retreat from the ideal from the American melting pot is curiously out of step with recent political history—and indeed with what the Court has said and done for more than a decade.[25]

McDonald v. Santa Fe Trail Transportation Co.[26] On September 26, 1970, the plaintiffs, who were white, together with one Negro employee of the Santa Fe Railroad, were jointly and severally charged with misappropriating 60 one-gallon cans of anti-freeze which was part of a shipment the Santa Fe was carrying for one of its customers. Six days later, the two white plaintiffs were fired by the Santa Fe, but the black employee was retained. The two white male plaintiffs brought this action in the U.S. District Court for the Southern District of Texas seeking relief against the Santa Fe Trail Transportation Company and the National Brotherhood of Teamsters Local #988, which represented the Santa Fe employees in all grievances alleging violations of the Civil Rights Act of 1866, specifically 42 U.S.C. §1981, and violations of Title VII of the Civil Rights Act of 1964. The plaintiffs alleged that their discharge was racially motivated.

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[24] United Jewish Organizations of Williamsburgh v. Carey, 97 S. Ct. 996, 1014 (1977).

[25] *Id.* at 1020.

[26] 427 U.S. 273 (1976).

Mr. Justice Marshall delivered the opinion of the Court. Mr. Justice White and Mr. Justice Rehnquist dissented but did not write dissenting opinions.

Mr. Justice Marshall, speaking for the Court, noted that Title VII of the Civil Rights Act prohibits the discharge of any individual because of "such individual's race." The terms of Title VII are not limited to discrimination against members of any particular race. Title VII prohibits discriminatory preference for any racial group-minority or majority. The conclusion of the Court was supported by the legislative history of Title VII and the remarks of Representative Celler on the floor of the House of Representatives to the effect that the Title created "an obligation not to discriminate against whites." Thus, the Court held that the law prohibits racial discrimination against whites as well as blacks based upon the application of the same standards.

The Court went on to note that the union was equally culpable for its failure to represent the plaintiff-employees under the union contract. In the words of the Court, "The same reasons which prohibit an employer from discriminating on the basis of race among the culpable employees, apply equally to the union, and whatever factors the mechanisms of compromise may legitimately take into account and mitigate discipline of its employees, under Title VII, race may not be one of them."[27]

The Court discussed the application of 42 U.S.C. §1981, which provides, in part, that "all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens. . . ."

When discrimination against blacks was at issue the court previously held that Section 1981 affords a federal remedy against discrimination in private employment on the basis of race. However, it was argued that Section 1981 did not apply against white persons because of the operation of the phrase "as enjoyed by white persons" and because of the legislative history of the law."

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27. *Id.* at 285.

The Court rejected both of those arguments holding that Section 1981 explicitly applies to "all persons" which means that it must include white persons and the phrase "as enjoyed by white persons" does not describe who is covered but only describes the right. Moving on to the legislative history, the Court noted that language on the floor of the House and Senate specifically stated that the bill was designed to protect the rights of all persons in the United States. Specifically, Senator Trumbull said, "Sir, this bill applies to white men as well as black men." Thus, the U.S. Supreme Court held for the two white plaintiffs.

THE *BAKKE* CASE

Allen Bakke, a white male, graduated from the University of Minnesota in 1962. After serving four years in the U.S. Marine Corps, he attended Stanford University where he received his Master of Science degree in Engineering in 1970. During this time period, he decided that he wanted to become a doctor. While employed as an engineer, he undertook nearly a full-time course load in biology and chemistry to meet medical school prerequisites. He also volunteered his services at a hospital. His undergraduate grade point average was 3.51 on a scale of 4.0. On his Medical College Admissions Test, Bakke scored in the 96th percentile on the verbal section, the 94th percentile on the quantitative test, the 97th percentile in science, and the 72nd percentile in general information.

In 1973 and 1974, he submitted his application to the University of California at Davis Medical School. The admissions committee gave him a rating of 93.6 out of a possible 100, but rejected his application. It seems that the medical school set aside 16 of its 100 openings for minority students and had a special admissions practice for these positions. The average score of the 16 successful minority candidates was as follows: GPA: 2.88; MCAT: 46th percentile verbal, 24th percentile quantitative, 35th percentile in science, 33rd percentile in general information.

Bakke, upon learning these and other facts brought an action in the California courts claiming that his constitutional rights had been violated. The trial court held that Bakke was entitled to have his admission considered without regard to his race or the race of any other applicant and awarded him court costs. On appeal, the California Supreme Court held that the state must meet the strict scrutiny test and the university must bear the burden of proof that Bakke would not have been admitted had there been no racial quota. The latter holding is based on the premise that once a prima facie case of racial discrimination is made, the burden of explaining away the impact falls upon the defendant.[28] When the university stipulated Bakke's academic credentials and could not sustain the burden of proof that he would not have been admitted had there been no racial quota, the California Supreme Court directed that he be admitted to the medical school. The university then successfully petitioned the U.S. Supreme Court for certiorari.

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[28] Franks v. Bowman Transportation Co., 424 U.S. 747 (1976).

It must be recalled that the *Bakke* case is not the first of its kind to reach the U.S. Supreme Court. The Court had granted certiorari in the case of *DeFunis v. Odegaard.* [29] At issue in *DeFunis* were the admission procedures of the University of Washington Law School. When DeFunis was later admitted to law school and subsequently graduated, the case was dismissed as moot. Mr. Justice Douglas disagreed claiming that while he did not believe the record showed that the University had violated DeFunis' rights, the plaintiff was entitled to no advantage by reasons of being white nor was he to be subject to any disability. In the words of Justice Douglas, "Whatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner."[30]

Bakke's Argument

It is Bakke's contention that the Davis Medical School's system of admissions is one partially based on racial quotas. But for that policy of racial quotas, he would have been admitted to the school. Thus, race has been used as a classification system. Since race is a suspect classification, the strict standards test must be used. Bakke pointed out that the school opened in 1968 and never tried any system other than one of racial discrimination so that we do not know if any other means of attracting minority students could work. He also brought forth the fact the Davis campus had never practiced racial discrimination against blacks so that the current admissions policy was not intended to correct one of the school's previous unconstitutional acts. His argument also pointed out that there can be a difference between affirmative action and a racial classification. Affirmative action programs to seek out qualified blacks are perfectly constitutional. Bakke also argued that the right to equal protection under the 14th amendment is a personal right, not a societal right and he raised the question that if the other side prevails, would we not find ourselves in the legal position where equal protection would no longer be available to every individual, but would depend upon the race of the individual asserting the right.

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[29] 507 P.2d 1169 (Wash. 1973), *cert. granted*, 414 U.S. 1038 (1973), *vacated*, 416 U.S. 312 (1974).

[30] *Id.* 416 U.S. at 337.

University of California's Argument

It is the contention of the university that at stake is the future of minorities to have meaningful access to higher education—access which up to now has not been available. The legacy of discrimination against blacks continues in the United States. The applicants to graduate school in the year that Bakke first applied entered grade school in 1960, which was only five years after *Brown II.* Furthermore, virtually no desegregation had occurred in the United States up to the time of the Civil Rights Act of 1964—years after the class question.

The Position of the U.S. Govermment

The U.S. government took the position that a racial classification for a benign purpose was perfectly permissible—only racial classifications for a detrimental purpose should be strictly reviewed. The government noted that the effects of racial discrimination are not easily remedied and mere neutrality toward race is not enough to rectify what had occurred before. Therefore, the university can take into account societal discrimination in formulating its admissions programs. A university should not have to wait until it is brought into court for failing to admit blacks and other minorities before it acts. The United States brief also pointed out that perhaps there was no discrimination at all in admitting a black with a lower grade point average. A GPA of 2.6 for a minority may be the equivalent of 3.0 because of the added problems a minority person would have to face.

Civil Rights Groups' Positions

These briefs stress the fact that the strict scrutiny test has never been applied to thwart governmental efforts to redress deprivations suffered by minorities. The classification only becomes suspect when it disadvantages a class entitled to special protection. Legal precedent for this position is contained in *San Antonio School District v. Rodriguez.*[31]

Civil rights groups contend that there is a compelling social interest to be served by this admissions policy. Since 22 per cent of the U.S. population is black or Chicano, minorities should be included in the professions. Fewer minority doctors mean fewer doctors in minority communities because white doctors do not practice in these communities. Minority professionals serve as a countervailing force to racial polarization because if they succeed others of their race have hope for doing likewise. In addition, everyone benefits from an integrated setting—white medical students as well as black.

It is also pointed out that there are no realistic alternatives. Many schools already engage in extensive minority recruitment programs which have not done well in numerical terms. Increasing the size of the medical school or the number of such schools would not help blacks, but would only increase the number of white doctors. Alternative programs for the economically disadvantaged do not necessarily help blacks because as many whites as blacks have financial problems, although the whites were never subject to inferior education because of race.

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[31] 411 U.S. 1 (1973).

Jewish Organizational Viewpoint

The Jewish civil rights organizations disagreed with their normal civil rights allies. They viewed quotas as very discriminatory and recalled when quotas for Jewish youngsters amounted to ceilings on the number that entered graduate school. Thus, they supported *Bakke*.

Summary

The issues in *Bakke* are complex. Which way is the Court leaning? It is hard to tell. One interesting aspect of the case is that after oral arguments had taken place, the Court asked for supplemental briefs on the applicability to the case of Title VI of the Civil Rights Act of 1964. That issue had not been raised at the trial or appellate levels. Some commentators point out that Title VI refers to race specifically, and the inference is, therefore, that the Davis Medical School, in using race in its admissions policy, violated the law and the Court need not reach the Constitutional question when a simple interpretation of statutory law is sufficient to decide the case.

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Burden of Proof—the Controlling Principle in Applying the First and Fourteenth Amendments

Kelly Frels
Attorney at Law
Bracewell & Patterson
Houston, Texas

SUBSTANTIVE CONSTITUTIONAL RIGHTS

The Supreme Court and litigants have expended considerable energies in defining the substantive coverage of the first and fourteenth amendments. With *Brown v. Board of Education*,[1] the nation was instructed that separate but equal was no longer the law of the land. *Pickering v. Board of Education*[2] held that a public school teacher cannot be discharged for exercising his or her first amendment rights. Similarly, *Tinker v. Des Moines Independent Community School District*[3] recognized that students and teachers do not shed their constitutional rights at the schoolhouse gate, and the basic standards for determining when a teacher is entitled to a hearing upon renewal or termination of employment were addressed in *Board of Regents v. Roth*[4] and *Perry v. Sindermann*.[5] The list of definitive decisions relating to the application of the first and fourteenth amendments is extensive and a review of each would consume more pages than this paper is allotted.

Since the courts do not issue advisory opinions but decide only those issues necessary to resolve the controversies before them, Supreme Court decisions many times spawn more questions than they answer. The result is that other litigants and courts must apply the Supreme Court's pronouncements to new and different controversies as they arise. Once significantly different standards or questions of public importance evolve from the lower courts' treatment of a Supreme Court decision, the Supreme Court often reviews the fruits of its initial decision. Occasionally, a subsequent case is presented in such a way that the Court can dispose of the case and prescribe specific standards for review of similar cases.

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[1] 34 U.S. 483 (1954).
[2] 391 U.S. 563 (1968).
[3] 393 U.S. 503 (1969).
[4] 408 U.S. 564 (1972).
[5] 408 U.S. 593 (1972).

In 1977, the Supreme Court supplemented its growing list of cases involving the controlling issue of which party has the burden of proof in civil rights cases by issuing four major decisions: *Mt. Healthy City School District v. Doyle;*[6] *Village of Arlington Heights v. Metropolitan Housing Development Corporation;*[7] *International Brotherhood of Teamsters v. United States;*[8] and *Hazelwood School District v. United States.*[9] Other cases decided during the October 1976 term, such as *Dayton Board of Education v. Brinkman*[10] and *Castenada v. Partida*[11] also relate to the placing of the burden of proof. The basic issue addressed in these cases is: "Which party has to prove what facts in order to prevail in the trial of a civil rights case?"

BURDEN OF PROOF

The facts involved in each civil rights suit, together with the relative skills of the attorneys, the dedication and financial capacities of the parties, the selection of a forum and other intangible considerations, make up the factors which determine the outcome of a case. The ground rules which define who has the burden of proving what during the trial in order to prevail often dictate the results. There are no hard and fast standards which prescribe which party has the burden of going forward with the proof; rather the placing of the burden by a court "is merely a question of policy and fairness based on experience in the different situations."[12] A court may create a rebuttable presumption in favor of the party having the overall burden of proof which then requires the other party to go forward with evidence to rebut the presumption. Presumptions shifting the burden of going forward with the proof during the trial are often created to reflect judicial evaluations of probabilities and to reflect a court's determination that the party to whom the burden has been shifted has superior access to the proof. Regardless of how and to whom a court shifts the burden of going forward with the proof in a trial, the party having the initial burden must shoulder the overall burden in order to prevail in the ultimate resolution of the suit.[13]

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[6] 97 S. Ct. 568 (1977).

[7] 97 S. Ct. 555 (1977).

[8] 97 S. Ct. 1843 (1977).

[9] 97 S. Ct. 2736 (1977).

[10] 97 S. Ct. 2766 (1977).

[11] 97 S. Ct. 1272 (1977).

[12] 9 J. Wigmore, Evidence § 2486 at 275 (3d ed. 1940); Keyes v. School Dist. No. 1, Denver, Colo., 413 U.S. 189, 209 (1973).

Two of the four major burden of proof cases decided by the Supreme Court in 1977, *Mt. Healthy City School District v. Doyle*[14] and *Village of Arlington Heights v. Metropolitan Housing Development Corporation*,[15] involve the application of the first or fourteenth amendments. The other two, *International Brotherhood of Teamsters v. United States*[16] and *Hazelwood School District v. United States*,[17] are "pattern or practice" cases brought pursuant to Title VII of the Civil Rights Act of 1964.[18] Although different substantive legal standards are often applicable to the adjudication of claims under Title VII than to first and fourteenth amendment inquiries, the basic principles concerning the burden of proof and the use of statistical proof are similar.[19] It is for this reason that the two Title VII cases have been included in this review.

Pre-1977 Burden of Proof Standards

In fashioning its 1977 burden of proof opinions, the Court drew on a substantial body of existing law. The primary cases relied upon were the major desegregation cases of *Swann v. Charlotte - Mecklenburg Board of Education*[20] and *Keyes v. School District No. 1, Denver Colorado.*[21] The two splinter school district cases of *Wright v. City of Emporia*[22] and *United States v. Scotland Neck Board of Education*[23] also offered a substantial experience base upon which the Court could rely. It has been in the context of racial segregation in the schools that the courts have been called upon to determine when "fairness" and "policy" should require defendants to shoulder the burden of explaining conditions or actions which appear to be racially motivated.

In school districts where state laws mandated separate facilities for blacks and whites, in districts with a history of segregation, or in districts where it is possible to identify a "white" or "black" school simply by reference to the factors of integration, "a prima facie case of violation of substantive constitutional rights is shown."[24] A school district with a "history of segregation" is one where a pattern of segregation has been established in the past which includes all of the examples given in the preceding sentence. In these school systems, the authorities have the burden of establishing that subsequent or other segregated schooling is not the result of past acts of intentional segregation.[25] *Keyes* imposed this same burden on school authorities in school districts where a meaningful part of the district, as opposed to isolated parts, was found to be intentionally segregated:

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[13] C. McCormick, Handbook of the Law of Evidence §§ 337, 343 (E. Cleary ed. 1972); James, *Burdens of Proof*, 47 Va. L. Rev. 51, 61 (1961); International Brotherhood of Teamsters v. United States, 97 S. Ct. 1843, 1867 (1977).

[14] 97 S. Ct. 568 (1977).

[15] 97 S. Ct. 555 (1977).

[16] 97 S. Ct. 1843 (1977).

[17] 97 S. Ct. 2736 (1977).

[18] 42 U.S.C. § 2000e *et seq.* (1970).

[19] Washington v. Davis, 426 U.S. 229 (1976).

[20] 402 U.S. 1 (1971).

[21] 413 U.S. 189 (1973).

[22] 407 U.S. 451 (1972).

[23] 407 U.S. 484 (1972).

> [W]e hold that a finding of intentionally segregative school board actions in a meaningful portion of a school system, as in this case, creates a presumption that other segregated schooling within the system is not adventitious. It establishes, in other words, a *prima facie* case of unlawful segregative design on the part of school authorities and shifts to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative action.[26]

Once a court finds that a meaningful part of a school district has been subject to intentional segregation, the school's burden is to produce proof that intentional segregation was not among the factors that motivated its action in the remainder of the district. In such cases, school authorities cannot simply rely upon explaining their actions as logical, racially neutral activities. Remoteness in time does not make the segregative acts any less intentional, but at some point in time, the relationship between past segregative acts and present segregation may become incapable of supporting a finding of de jure segregation. Since this casual relationship has so many lasting effects, a school district that is unable to disprove segregative intent can rebut a prima facie case only by establishing that its past segregative acts did not create or contribute to current segregated conditions.[27]

When an attempt is made to remove a portion of a school district operating under Court-ordered desegregation in order to create a splinter school district, the opponents of such a move only have the burden of proving that the creation will adversely affect the desegregation efforts of the district. It is not necessary to prove that the creation of the new district is racially motivated because intentional segregation was the basis for the issuance of the pre-existing court order.[28]

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[24] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 18 (1971). The factors of integration set out in Green v. County School Board of New Kent County, Va., 391 U.S. 30 (1968), are the facets of school operation including the composition of student bodies, staff, faculty, transportation, and extracurricular activities.

[25] *Id.*

[26] Keyes v. School Dist. No. 1, Denver, Colo., 413 U.S. 189, 208 (1973).

[27] *Id.*

Another case of significant precedential value relied upon by the Court in 1977 was *Washington v. Davis*[29] wherein the plaintiffs alleged that a written personnel test, which excluded a disproportionately high number of black applicants for the District of Columbia police force, violated the due process clause of the fifth amendment and the Civil Rights Act of 1870.[30] The district court found that the number of black officers was not proportionate to the population mix of the city; a higher percentage of blacks failed the test than whites; and the test had not been validated to establish its reliability for measuring subsequent job performance. The court held that this showing was sufficient to shift the burden of proof to the defendant. The defendant city demonstrated that it had undertaken affirmative efforts to recruit black officers, and had increased the percentage of blacks in recruit classes and in the force generally; and the city established that the test was related to the training program. Based on these factual findings, the district court ruled in favor of the city. An appeal was taken. The court of appeals reversed the district court ruling and applied the proof standards applicable to cases arising under Title VII of the Civil Rights Act of 1964 enunciated in *Griggs v. Duke Power Co.*[31]

The Supreme Court reversed the court of appeals and specifically held that Title VII standards were not applicable to a review of a constitutional or section 1981 claim of racial discrimination. Disproportionate impact is not irrelevant but, standing alone, it does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations. In order to prevail in a constitutional challenge, a plaintiff must prove that the disporportionate impact resulted from the racially motivated actions of the governmental body.[32]

The *Washington v. Davis* Court stated that the burden of proof in constitutional cases is initially upon the plaintiff to establish a prima facie case of racial discrimination based upon proof of purposeful discrimination. If the plaintiff succeeds, the burden then shifts to the defendant to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection produced the disparate result. In affirming the district court's decision without delineating specific standards, the Supreme Court set the stage for a subsequent case to examine further the proof necessary for a plaintiff to meet his or her initial burden in order to establish a prima facie case of purposeful racial discrimination. The Court undertook this further examination in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*[33] after laying an additional predicate in *Mt. Healthy City School District v. Doyle.*[34]

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[28] Wright v. City of Emporia, 407 U.S. 451 (1972).

[29] 426 U.S. 229 (1976).

[30] 42 U.S.C. §1981 (1970).

[31] 401 U.S. 424 (1971).

[32] The constitutional standard is probably applicable to all claims made pursuant to the Civil Rights Acts of 1855, 1870 and 1871. The constitutional standard is apparently controlling in actions brought under Title VI of the Civil Rights Act of 1964. *United States v. Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966), *decree corrected*, 380 F.2d 385, *cert. denied*, 389 U.S. 840 (1967). "But we hold that HEW's standards are substantially the same as this Court's standards. They are required by the constitution and, as we construe them, are within the scope of the Civil Rights Act of 1964." *Id.* 372 F.2d at 848.

The 1977 Cases

Based on this body of law, the Supreme Court, in its October 1976 term, continued on its inevitable journey toward the refinement of the controlling issue of civil rights litigation: Which party has the burden to prove what during a civil rights trial? To appreciate the work of the Supreme Court in determining who has this burden of proof, a review of the significant decisions of 1977 is warranted.

Mt. Healthy City School District v. Doyle:[35] Fred Doyle was an Ohio teacher who had been employed on three one-year and one two-year contracts for a total of five years' service. He had become active in the Teacher's Association and had served as its president and negotiator. Tensions developed between the Association and the Board in connection with these activities. Mr. Doyle was also involved in some incidents not directly related to his activities with the Association. He engaged in an argument with another teacher which resulted in the other teacher slapping him. He refused to accept an apology and insisted that the other teacher be punished. Both teachers were suspended for one day. Other teachers walked out, and the suspensions were lifted. On another occasion, Mr. Doyle argued with school cafeteria employees over the amount of spaghetti he was served. In addition, he referred to students as "sons of bitches" in connection with a disciplinary complaint. Mr. Doyle also made an obscene gesture to two girls when they failed to comply with commands he gave in his capacity as a cafeteria supervisor. The last in the series of events involved his calling the local radio station to advise them that a teacher's dress code had been adopted. The station aired the item which had come to Mr. Doyle's attention in a memorandum from his principal. The administration apparently felt that there was a relationship between teachers' appearance and public support for a bond issue, and Mr. Doyle understood that the dress code subject was to be settled by joint teacher-administrative action.

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[33] 97 S. Ct. 555 (1977).
[34] 97 S. Ct. 568 (1977).
[35] *Id.*

About one month after the dress code incident, the superintendent recommended that Mr. Doyle and nine other teachers not be rehired. Upon request, Mr. Doyle was advised that he was not being recommended for tenure because of "a notable lack of tact in handling professional matters which leaves much doubt as to your sincerity in establishing good school relationships."[36] Reference was then made to Mr. Doyle's call to the radio station and his use of obscene gestures to correct students in the cafeteria. The Board approved the superintendent's recommendation and refused to grant Mr. Doyle a hearing. Mr. Doyle brought suit. The district court found that Mr. Doyle's call to the radio station was protected speech under the first and fourteenth amendments and it ordered him reinstated with back pay.

The Supreme Court recognized that the school district could decline to renew Mr. Doyle's employment contract without stating a reason because he did not have tenure. Furthermore, he was not entitled to a hearing.[37] Nevertheless, one who does not have tenure or a contractual expectancy of reemployment may establish a claim for reinstatement if the decision not to rehire the teacher is made by reason of the teacher's exercise of constitutionally protected first amendment freedoms.[38] The Court also recognized the long-standing principle expressed in *Pickering v. Board of Education*[39] that whether a public employee's speech is protected necessarily entails the striking of "a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interests of the State as an employer, in promoting the efficiency of the public service it performs through its employees."[40]

The Supreme Court accepted the lower court's finding that Mr. Doyle's call to the radio station was protected by the first and fourteenth amendments. The Court did, however, experience problems in determining whether this finding should entitle Mr. Doyle to reinstatement. The Court raised the question of whether the Board would have reached the same result concerning his employment had Mr. Doyle not called the radio station. The Court was faced with the following dilemma in applying the first and fourteenth amendments:

> A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be

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[36] *Id.* at 573.
[37] Board of Regents v. Roth, 408 U.S. 564 (1972).
[38] Perry v. Sindermann, 408 U.S. 593 (1972).
[39] 391 U.S. 563 (1968).
[40] *Id.* at 568.

> able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.[41]

To resolve this dilemma, the Court formulated a "test of causation which distinguishes between a result caused by a constitutional violation and one not so caused."[42] Through this "test," the Court placed the initial burden on Mr. Doyle to "show that his conduct was constitutionally protected, and that this conduct was a 'substantial factor'—or to put it in other words, that it was a '*motivating factor*' in the Board's decision not to rehire him." (emphasis added).[43] The Court determined that Mr. Doyle had carried this burden, but remanded the case for a determination as to "whether the Board had shown by a *preponderance of the evidence* that it would have reached the same decision as to respondent's (Mr. Doyle's) reemployment even in the absence of the protected conduct." (emphasis added).[44] The Court did not independently review the lower court's balancing of the teacher's right to comment on public issues in relationship to the public body's interest in promoting the efficiency of the public services it performs through its employees. Apparently, the *Pickering* balancing test was made by the district court in determining whether Doyle's speech was protected under the circumstances. Regardless, the Supreme Court determined that Mr. Doyle's conduct was protected by the first amendment and that Mr. Doyle had carried his initial burden of proving that a motivating factor in the Board's decision not to renew his employment was his call to the radio station. Having established his prima facie case, the burden of going forward with the evidence then shifted to the Board to show that it would have reached the same result regardless of Mr. Doyle's protected speech.

Village of Arlington Heights v. Metropolitan Housing Development Corporation:[45] The Metropolitan Housing Development Corporation applied to the city suburb of Arlington Heights for the rezoning of fifteen acres from a single-family to a multi-family classification. The Village denied the rezoning request, and the Development Corporation filed suit alleging that the denial was racially discriminatory. According to the 1970 census, only 27 of the 64,000 residents of the Village were black. The district court entered judgment for the Village, but the Court of Appeals for the Seventh Circuit reversed finding that the "ultimate effect" of the denial was racially discriminatory; therefore, the refusal to rezone was a violation of the fourteenth amendment.

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[41] Mt. Healthy Sch. Dist. v. Doyle, 97 S. Ct. 568, 575 (1977).

[42] *Id.*

[43] *Id.* at 576.

[44] *Id.* Although the Supreme Court gave considerable consideration in 1977 to the burden of proof in civil rights cases, this is the sole reference to the standard of proof applicable. Apparently the Court does not intend to deviate from a preponderance of the evidence as the standard. *See also* Turner v. Texas Instruments, F.2d (No. 75-3200 5th Cir. July 15, 1977) where the Fifth Circuit held that the preponderance of the evidence standard was applicable for meeting all burdens of proof in a Title VII suit.

[45] 97 S. Ct. 555 (1977).

Drawing upon the specific holding of *Washington v. Davis*,[46] the Supreme Court rejected the "ultimate effect" test and stated that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact."[47] In order to carry the burden of showing a violation of the equal protection clause, "proof of racially discriminatory intent or purpose is required."[48] A disproportionate impact of official action on one race is certainly relevant in determining whether there was racial motivation, but the mere existence of a disproportionate impact is not conclusive.

In attempting to meet his or her burden of establishing a prima facie case of racial discrimination, a plaintiff must look to both direct and circumstantial evidence. Without purporting that the list was exhaustive, the *Village of Arlington Heights* Court reviewed the following six areas of legitimate inquiry in determining whether invidious purpose is a motivating factor in a fourteenth amendment case: (1) A determination that official action "bears more heavily on one race than another" may provide an important starting point. Absent a "stark" or "gross" pattern, impact alone is not determinative, and a court must look to other evidence.[49] (2) The historical background of the decision can be reviewed for evidence of motive, particularly if it reveals a series of official actions taken for invidious purposes. (3) The sequence of events leading to the questioned official action may shed some light on the public body's purposes. (4) Any departures from the normal procedural sequence might also be evidence that improper motives played a role. (5) Substantive departures from the the expected norm may be relevant to establishing improper motive. This is especially relevant if the factors considered important by the decision-maker strongly favor a different conclusion than that reached. (6) If legislative history is available, it may be highly relevant. This is especially true if there are statements by members of the public body, minutes of the meetings or other reports available.

The Court reviewed the record and determined that the plaintiffs failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision not to rezone. Had the plaintiffs established a prima facie case that the decision was motivated *even in part* by a racially discriminatory purpose (a motivating factor), the burden would have shifted to the Village to establish that the same decision would have resulted even had the impermissible purpose not been considered. If the Village could establish that the same decision would have been made even in the absence of the prohibited purpose, there would be no justification for the courts to interfere.[50]

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[46] 426 U.S. 299 (1976).

[47] Village of Arlington Heights v. Metropolitan Housing Development Corp., 97 S. Ct. 555, 563 (1977).

[48] *Id.*

[49] *See* discussion of Castaneda v. Partida, 97 S. Ct. 1272 (1977), *infra* concerning gross underrepresentation.

International Brotherhood of Teamsters v. United States[51] and *Hazelwood School District v. United States*:[52] were both brought under Title VII of the 1964 Civil Rights Act alleging that the defendants had engaged in a "pattern or practice" of discrimination against blacks. In *Hazelwood*, the school district allegedly discriminated against black applicants while in *International Brotherhood of Teamsters*, black applicants were allegedly passed over for promotion to more desirable positions through the imposition of a seniority system. The two cases are instructive not only from the burden of proof perspective but also because of the Court's position on a plaintiff's use of statistical proof in meeting his or her overall burden of proof. Although *International Brotherhood of Teamsters* is important as a substantive statement of Title VII law, its true significance could be the Court's statement of the principles applicable to the burden of proof.

The *Teamsters'* Court reviewed *McDonnell-Douglas v. Green*[53] in which the Court held that a person suing as an individual under Title VII must carry the initial burden by establishing a prima facie case of racial discrimination. On the specific facts of *McDonnell-Douglas*, the Court concluded that the individual had met this burden by showing that he was a qualified applicant, that he was a member of a racial minority, and that he had unsuccessfully sought a vacancy for which the employer had continued to seek applicants with similar qualifications after rejecting him. This initial showing justified the inference that the applicant had been denied employment for racial reasons, and it established a prima facie case. The burden then shifted to the employer to rebut the inference by offering some legitimate, nondiscriminatory reasons for the rejection. The general principle was thus established that "any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act."[54] *Franks v. Bowman Transportation Co.*[55] applied the principle of *McDonnell-Douglas* to a class action in which the plaintiffs "demonstrated the existence of a discriminatory hiring pattern or practice," and the company failed to rebut the class-wide prima facie case. By establishing a pattern or practice violation, the plaintiffs made out a prima facie case of discrimination against the individual class members, and the burden shifted to the employer to prove that individual class members were denied employment opportunities for lawful reasons.

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[50] Village of Arlington Heights v. Metropolitan Housing Development Corp., 97 S. Ct. 555, 556 n. 21 *citing* Mt. Healthy School District v. Doyle, 97 S. Ct. 568 (1977).

[51] 97 S. Ct. 1843 (1977).

[52] 97 S. Ct. 2736 (1977).

[53] 411 U.S. 792 (1973).

The *Teamsters'* Court found that the government had met its burden of proving that the company had engaged in a systemwide pattern or practice of discrimination against minority members in violation of Title VII. The company was found to have regularly and purposefully treated minority persons less favorably than whites. The statistical disparities in the employment of minorities in line-driver positions as compared with whites together with testimony of specific acts of discrimination were sufficient to establish the plaintiff's prima facie case under the "disparate treatment" theory. The company then failed to adequately rebut this evidence in the presentation of its case. Having established a pattern or practice violation, a presumption of discrimination was created in favor of each minority applicant who had applied for a line-driver position after the effective date of Title VII. Under *Franks*,[56] the company then had the burden of showing, on an individual basis, that its earlier refusal to employ each minority applicant was not based on its policy of discrimination. In remanding the case for further proceedings, the Supreme Court directed that the minority persons who had not applied for a line-driver position be given the opportunity to prove that they would have applied for the position but for the company's discriminatory policy. The Court held that if any non-applicant can meet this burden, he or she should be treated as an applicant who is presumptively entitled to relief, subject of course to the company's right to establish that its refusal to employ the person was based on nondiscriminatory grounds.[57]

In the *Teamsters'* case, the Court specifically considered the requirement of proving racial motivation in a Title VII case. When a Title VII plaintiff pursues a claim using the "disparate treatment" theory, as was done in *Teamsters*, the ultimate fact issues are whether there was a pattern or practice of such disparate treatment, and, if so, whether the differences were "racially premised."[58] Proof of racial motivation is, therefore, essential to the establishment of a prima facie case under the "disparate treatment" theory, and as the Court noted, racial motivation "can in some situations be inferred from the mere fact of differences in treatment."[59] Unlike cases pursued under the "disparate treatment" theory, those brought pursuant to claims of "disparate impact" do not require proof of racial motivation. Claims of "disparate impact" involve employment practices that appear basically neutral in their treatment of different groups but when applied fall more harshly on one group than another and cannot be justified by a business necessity. Either theory may be applied to a particular set of facts.[60]

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[54] International Brotherhood of Teamsters v. United States, 97 S. Ct. 1843, 1866 (1977).

[55] 424 U.S. 747 (1976).

[56] *Id.*

[57] *Id.*

[58] International Brotherhood of Teamsters v. United States, 97 S. Ct. 1843, 1854 (1977).

In determining whether the Hazelwood School District was guilty of a "pattern or practice" of discrimination against black teacher applicants, the district court compared the racial/ethnic percentage of the District's teachers to the racial/ethnic percentage of the District's students.[61] The court of appeals, in reversing the district court, held that this comparison was incorrect. The Supreme Court held:

> There can be no doubt, in light of the *Teamsters* case, that the District Court's comparison of Hazelwood's teacher work force to its student population fundamentally misconceived the role of statistics in employment discrimination cases. The Court of Appeals was correct in the view that a proper comparison was between the racial composition of the qualified school teacher population in the relevant labor market. (footnote omitted)[62]

The *Hazelwood* Court then proceeded to review the factors which should be considered in determining the relevant labor market. The government submitted that the labor market should reflect the percentage of black teachers in St. Louis County and the City of St. Louis which was 15.4%. The percentage of black teachers in St. Louis County alone was 5.7%. The percentage of black teachers employed by Hazelwood in the affected years was 3.7% of its teaching staff. The Supreme Court did not determine if either of the two percentages, 5.7% or 15.4%, would reflect the percentage of blacks in the relevant labor market. Instead, the Court remanded the case to the district court for a determination of the relevant labor market. In doing so, the Court gave the following instructions:

> In determining which of the two figures—or very possibly, what intermediate figure—provides the most accurate basis for comparison to the hiring figures at Hazelwood, it will be necessary to evaluate such considerations as (i) whether the racially based hiring policies of the St. Louis City School District were in effect

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[59] *Id.* at 1854-55 n. 15.

[60] *Id.*

[61] Hazelwood Sch. Dist. v. United States, 97 S. Ct. 2736 (1977).

[62] *Id.* at 2742.

> as far back as 1970, the year in which the census figures were taken;[18] (ii) to what extent those policies have changed the racial composition of that district's teaching staff from what it would otherwise have been; (iii) to what extent St. Louis' recruitment policies have diverted to the city teachers who might otherwise have applied to Hazelwood;[19] (iv) to what extent Negro teachers employed by the city would prefer employment in other districts such as Hazelwood; and (v) what the experience in other school districts in St. Louis County indicates about the validity of excluding the City School District from the relevant labor market. (footnotes omitted)[63]

The Supreme Court observed that

> [b]ecause the District Court focused on a comparison between the percentage of Negro teachers and Negro pupils in Hazelwood, it did not undertake an evaluation of the relevant labor market, and its casual dictum that the inclusion of the city of St. Louis "distorted" the labor market statistics was not based upon valid criteria. 392 F.Supp., at 1287.[64]

The considerations suggested by the Court in determining the relevant labor market are not all inclusive. Each employment situation is unique, and an examination of it must be considered on a case-by-case basis.

In *International Brotherhood of Teamsters* and *Hazelwood*, the Court considered the use of statistics in "pattern or practice" employment discrimination cases brought by the United States. The Court's holdings relating to statistics and the burden of proof in these cases can be summarized as follows: The plaintiff's burden is to establish by a preponderance of the evidence that racial discrimination was the defendant's standard operating procedure. Statistics may be be used in proving employment discrimination when the divergence between the percentage of the minorities employed and the percentage available in the relevant labor market differs significantly. Statistics showing racial or ethnic imbalance are probative in a case because the imbalance is often a telltale sign of purposeful discrimination. Statistics are not irrefutable because they come in an infinite variety and, like any other kind of evidence, they may be rebutted. Where gross statistical disparities can be demonstrated, they alone may constitute prima facie proof of a pattern or practice of discrimination. The use of statistics depends, of course, on all the surrounding facts and circumstances of a case.

If a plaintiff establishes a prima facie case of a pattern or practice of discrimination, the burden then shifts to the defendant to defeat the *prima facie* showing by demonstrating that the proof offered is either inaccurate or insignificant. For example, an employer might show that the claimed discriminatory pattern is a product of hiring prior to the application of the Civil Rights Act of 1964 rather than a result of an unlawful discriminatory practice after the Act became effective. The employer could also show that during the period of time it was alleged to have pursued a discriminatory policy, it made too few employment decisions to justify the inference that the decision at issue was made in a regular practice of discrimination. Another showing could be that minority applicants were recruited and jobs were offered, but the rate of responses and acceptances were low.

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[63] *Id.* at 2743-44.

[64] *Id.* n. 20.

Upon proof of the existence of a discriminatory hiring pattern or practice, there are reasonable grounds to infer that the company's individual employment decisions were made in pursuit of the discriminatory policy. A rebuttable presumption is, therefore, created in favor of relief for each individual member of the class affected. In applying this principle, the *Teamsters* Court cautioned that the establishment of a prima facie case does not conclusively demonstrate that all of the employer's employment decisions are part of the proven discriminatory pattern and practice, but it does "create a greater likelihood that any single decision was a component of an overall pattern."[65] The burden, therefore, shifts to the employer to come forth with proof to demonstrate that each individual applicant, in whose favor the presumption is established, was denied the employment opportunity for lawful reasons.[66] The employer is, of course, in the best position to establish why an individual employee was denied an employment opportunity.[67]

Two other cases decided during the October 1976 terms, *Castaneda v. Partida*[68]and *Dayton Board of Education v. Brinkman*,[69] offer further guidance in applying the first and fourteenth amendments. *Castaneda* is significant for its use of statistical analysis, and *Brinkman* is important because it relates the timeliness of past discrimination to present remedies.

Castaneda v. Partida involved an attack on the grand jury selection process in Hidalgo County, Texas. Over the last 11 years, the selection system resulted in the County's grand juries being 39% Spanish surnamed while, according to the 1970 census data, 76.1% of Hidalgos County's population was of Hispanic origin. The Court reviewed the "rule of exclusion" as a method of proving discrimination in jury selection cases but recognized that *Washington v. Davis*[70] and *Village of Arlington Heights v. Metropolitan Housing Development Corporation*[71] established that an official act is not unconstitutional *solely* because it has a racially disproportionate impact. The Court, nevertheless, applied the "rule of exclusion" or "gross disparity test" it mentioned in *Washington v. Davis* and *Village of Arlington Heights* by holding that the disparity in *Castaneda* was sufficiently large to establish a prima facie case of racial motivation. The Court explained the reason for applying the "rule of exclusion" as follows:

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[65] International Brotherhood of Teamsters v. United States, 97 S. Ct. 1843, 1866-67 n. 45 (1977).

[66] *Id.*

[67] *Id.*

[68] 97 S. Ct. 1272 (1977).

[69] 97 S. Ct. 2766 (1977).

> The idea behind the rule of exclusion is not at all complex. If a disparity is sufficiently large, then it is unlikely that it is due solely to chance or accident, and in the absence of evidence to the contrary, one must conclude that racial or other class-related factors entered into the selection process. See *Arlington Heights v. Metropolitan Housing Corp.*, 97 S. Ct. 555, 50 L.Ed. 2d 450 (1977); *Washington v. Davis*, 426 U.S. 229, 241 96 S. Ct. 2040, 2048, 48 L.Ed. 2d 597 (1976); *Eubanks v. Louisiana*, 356 U.S., at 587, 78 S.Ct. at 973; *Smith v. Texas*, 311 U.S., at 131, 61 S.Ct. at 165; Cf. n.17 *infra*.[72]

The Court considered binomial distribution and the use of standard deviations as a statistical technique for proving a gross disparity:

> As a general rule for such large samples, if the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that the jury drawing was random would be suspect to a social scientist.[73]

Once a plaintiff has established that his or her group is sufficiently or grossly under-represented on the jury panel, the plaintiff has carried the burden of establishing a prima facie case. The burden then shifts to the state to rebut or negate the prima facie showing either by presenting proof or by calling attention to facts subject to judicial notice. This the state failed to do in *Castaneda*. In so holding, the Court noted that the grand jury selection process was subjective and that the grand jury commissioners were not called to testify as to how the selection process actually operated.

The use of standard deviations will doubtlessly be applied in future cases brought under both the Constitution and Title VII. In fact, the Court referred to the *Castaneda* standard deviation analysis in *Hazelwood School District v. United States*[74] in conjunction with the employment of black teachers. In employment cases in which the expected number in a relevant labor market may be different from the general population, the determination of the expected number becomes the first and most significant determination. After the expected number is established and the observed number is known, the standard deviations can be formulated. If the difference between the expected number of black teachers and the observed number of black teachers is greater than two or three standard deviations, "then the hypothesis that teachers were hired without regard to race would be suspect."[75] When two or three standard deviations are present in a Title VII or fourteenth amendment case, it will not be surprising to see the courts apply the "rule of exclusion" and, therefore, find that a class is significantly or grossly under-represented. Such a finding could either independently establish a prima facie case or become a significant factor in establishing racial motivation. Of course, once a prima facie case is established, the burden shifts to the defendant to rebut or negate the presumption of illegal discrimination.

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[70] 426 U.S. 299 (1976).

[71] 97 S. Ct. 555 (1977).

[72] Castaneda v. Partida, 97 S. Ct. 1272, 1280 n. 13 (1977).

[73] *Id.* at 1281 n. 17.

[74] 97 S. Ct. 2736, 2742 n. 14 (1977).

In *Dayton Board of Education v. Brinkman*,[76] the Court considered what an appropriate remedy would be in a school district where mandatory segregation of the races by law had long since ceased. (Ohio had forbidden separate school facilities for blacks and whites since 1888.) The Court found the record insufficient to support the system-wide remedy ordered by the district court. In remanding the matter for further hearings on alleged racially motivated actions by the Board of Education, the Court stated the burden of proof applicable:

> The duty of both the District Court and the Court of Appeals in a case such as this, where mandatory segregation by law of the races in the schools has long since ceased, is to first determine whether there was any action in the conduct of business of the school board which was intended to, and did in fact, discriminate against minority pupils, teachers or staff. *Washington v. Davis, supra* . . . If such violations are found, the District Court. . . must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations.[77]

For the first time since mentioning the timeliness of segregative action in *Swann v. Charlotte-Mecklenburg Board of Education*,[78] the Court in

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[75] *Id.* Should the courts be inclined to adopt the standard deviation analysis of *Castaneda*, the appropriateness of two or three standard deviations as opposed to a greater number will surely be a matter of dispute before every court which must decide whether there is a gross under-representation which could trigger the application of the "rule of exclusion."

[76] 97 S. Ct. 2766 (1977).

[77] *Id.* at 2775.

[78] 402 U.S. 1 (1971).

Brinkman found state-imposed segregation too antedated to support a present-day remedy. In a school district such as Dayton, the plaintiff's burden is to establish that recent racially motivated actions of the board led to discrimination against students or teachers.[79] Once the unlawful discrimination has been established, the court must turn to the next step in the litigation — a determination of the appropriate remedy. The determination of what is an appropriate remedy is, of course, a subject for another occasion.

SUMMARY AND CONCLUSION

These cases establish some important principles. While the overall burden of proof is upon the party seeking redress, the courts will shift the burden of proof at the trial. Once the plaintiff has established a prima facie case, the courts shift the burden to the other party to negate or disprove the prima facie case. In determining who should have the burden of proof, the courts consider "questions of policy and fairness" based on the court's experience. A guiding principle in placing the burden is to place it on the party who has superior access to the proof. The standard of proof required to meet any burden is apparently the preponderance of the evidence.

When a Title VII plaintiff is proceeding under the "disparate impact" theory, proof of racial motivation is not necessary. However, when the "disparate treatment" theory is pursued, proof of racial motivation is essential to the establishment of a prima facie case. A plaintiff claiming racial discrimination based upon the Constitution or 42 U.S.C. § 1981 must prove that the action of the governmental body was racially motivated in order to establish a prima facie case. Presumably, the same proof must be made in order to prevail under other provisions of the Civil Rights Acts of 1866, 1870 and 1871 as well as Title VI of the Civil Rights Act of 1964.

To prove that a governmental decision was racially motivated is difficult. Disproportionate impact is not irrelevant to the proof of racial discrimination but, standing alone, it does not normally establish a prima facie case. Other proof, based on such inquiries as are listed in *Village of Arlington Heights*, must be adduced to establish that the governmental acts were racially motivated. In jury selection cases and certain others in which the plaintiff's group is sufficiently or grossly under-represented, the courts have applied the "rule of exclusion", thereby holding the gross under-representation sufficient to prove racial motivation and to establish a *prima facie* case. In applying the "rule of exclusion" to jury selection in

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[79] *See* Keyes v. School Dist. No. 1, Denver, Colo., 413 U.S. 189 (1973).

Castaneda, the Court approved the use of binomial distribution based on two or three standard deviations. The importance of this analysis to employment discrimination cases was emphasized when the *Hazelwood* Court referred to the *Castaneda* standard deviation analysis.

In situations where there has been no proof of prior discrimination but the plaintiff establishes that the governmental decision was motivated *even in part* by a racially discriminatory purpose, the burden shifts to the governmental body to prove that the same decision would have resulted had the discriminatory purpose not been considered. The same burden shifting is applicable when a teacher demonstrates that a motivating factor in the school district's decision to terminate his or her employment was the teacher's exercise of first amendment rights. If the governmental body is successful in discharging its burden of showing that the same decision would have been made regardless of the improper motive, the courts must let the decision stand. The same burdens are not applicable, however, when a school district has been found guilty of discrimination in the past. In such cases, the school authorities have the burden of establishing that subsequent or other segregated schooling is not the result of past acts of intentional discrimination. In the case wherein a court has found that a meaningful part of the district has been subject to intentional segregation, the school's burden is to prove that intentional segregation was not among the factors that motivated its actions in the remainder of the district.

The principles and authorities reviewed above will be subject to further examination in future cases. As the courts continue to come to grips with additional substantive constitutional rights, the question of whether one has discharged his or burden of proof by a preponderance of the evidence will become the issue of primary concern. The controlling issue of who has the burden to prove what, coupled with the abilities of the parties and their counsel to do so, should determine the outcome of most civil rights cases.

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Significant School Law Cases Pending Before the U.S. Supreme Court.

What Do They Portend for the Governance and Administration of the Public Schools?

Thomas A. Shannon
Executive Director
National School Boards Association

On October 3, the attention of persons interested in school law was focused on the massive white marble building at the intersection of First Street and Maryland Avenue, N.E. in Washington, D.C., where the United States Supreme Court does its work. It was the beginning of the fall term for the Court and the first day of the the term is marked by the publication of a long list of cases. This list is generally divided into two parts—one identifying the cases that the Court has decided to hear and the other noting those cases that the Court will not hear.

Often, the cases that the Court refuses to hear have as significant an impact upon school district governance as those cases it actually hears. Technically, a refusal to grant certiorari does not necessarily mean that the Court agrees completely with the lower court's decision. All it really means is that based upon the facts of the individual case, the Court sees no persuasive reason to disturb the holding or convert it into a general rule of law. As a practical matter, however, a decision not to grant certiorari is viewed as a sort of back door affirmation of the lower court's decision. In this sense, a refusal to grant certiorari has a reverse-twist impact upon school district governance.

Consider, for example, a few cases that the Supreme Court has announced it will not hear during the present term. Certiorari was denied in several cases involving Delaware school districts in which the lower federal courts found interdistrict *de jure* segregation and ordered that the districts submit district *and* interdistrict pupil desegregation plans.[1] This amounted to a requirement that the Wilmington district and several suburban districts reorganize into a new district or districts. The lower federal court even ordered the creation of an interim school board to govern the consolidated districts until the Delaware legislature could act on the desegregation order. Apart from its enormous impact upon the governance of the Delaware school districts involved, the U.S. Supreme Court's refusal to grant certiorari will bolster the advocacy of metropolitan desegregation as a sound remedy to desegregate suburban school districts.

Certiorari was also denied in two cases involving homosexual teachers. In one, arising in New Jersey, the High Court declined to review the New Jersey Supreme Court's ruling that upheld a local school board's right to require a teacher, who was the president of a statewide so-called "gay" organization, to submit to a psychiatric examination.[2] In the other case, a State of Washington Supreme Court decision was allowed to stand holding that a public school teacher, who was a self-acknowledged homosexual and who was well-known as such in his community, was not fit to be a teacher and could be dismissed for "immorality" under a school board policy.[3]

An establishment of religion case arising in California was refused certiorari.[4] In that case, the state supreme court had upheld a public high school's policy refusing to grant a student Bible Club the same privileges extended to other student clubs, such as the right to meet during school hours, use school facilities and publicize its activities through the school newspaper and bulletin board. The California Supreme Court's decision was based on the twin-theory that the refusal to grant the Bible Club such privileges was not a violation of its members' first or fourteenth amendment rights; and to permit the Bible Club to operate would have been a violation of the establishment of religion clause of the first amendment.

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[1] Delaware State Bd. of Educ. v. Evans, *sum*, 46 U.S.L.W. 3162, *cert. denied*, 46 U.S.L.W. 3220 (U.S. Oct. 4, 1977) (No. 77-131); Claymont Sch. Dist. v. Evans, *sum*, 46 U.S.L.W. 3162, *cert. denied*, 46 U.S.L.W. 3220 (U.S. Oct. 4, 1977) (No. 77-223); Newark Sch. Dist. v. Evans, *sum*, 46 U.S.L.W. 3162, *cert. denied*, 46 U.S.LW. 3220 (U.S. Oct. 4, 1977) (No. 77-235); New Castle-Gunning Bedford Sch. Dist. v. Evans, *sum*, 46 U.S.L.W. 3162, *cert. denied*, 46 U.S.L.W. 3220 (U.S. Oct. 4, 1977) (No. 77-236); Marshalltown-McKean Sch. Dist. v. Evans, *sum*, 46 U.S.L.W. 3163, *cert. denied*, 46 U.S.L.W. 3220 (U.S. Oct. 4, 1977) (No. 77-239).

[2] Gish v. Board of Educ. of the Borough of Paramus, 336 A.2d 1337 (N.J. Super. Ct. App. Div. 1976), *cert. denied*, 46 U.S.L.W. 3220 (U.S. Oct. 4, 1977) (No. 77-3).

[3] Gaylord v. Tacoma Sch. Dist. No. 10, 559 P.2d 1340 (Wash, 1977), *cert. denied*, 46 U.S.L.W. 3220 (U.S. Oct. 4, 1977) (No. 77-91).

[4] Johnson v. Huntington Beach Union H.S. Dist., 137 Cal. Rptr. 43 (Ct. App. 1977), *cert. denied*, 46 U.S.L.W. 3219 (U.S. Oct. 4, 1977) (No. 76-1739).

School board policies on permissible regulations affecting a school employee's right to participate in elections also were considered.[5] In that case, a county school board in Georgia had enacted a rule requiring any employee who becomes a candidate for elective governmental office to take an unpaid leave during the campaign. The lower federal court said that the school board policy was subject to the U.S. Voting Rights Act. That Act requires that states or local political subdivisions must obtain either a judicial determination of the validity of any proposed rule purporting to change any voting qualification, standard, practice, or procedure, or the U.S. Attorney General's approval of the proposed rule.

The Ninth Circuit Court of Appeals reversed a federal trial court's decision in a teacher transfer case in which an Arizona school board involuntarily transferred a teacher from one school to another.[6] The teacher claimed that the transfer was in retaliation for exercising constitutionally protected free-speech rights. The trial court held that even if the teacher's argument was accepted, the transfer from one school to another did not deprive her of a "valuable governmental benefit." The circuit court remanded the case back to the trial court to determine whether or not the school board could show that the transfer would have occurred regardless of the constitutionally protected conduct and the U.S. Supreme Court refused to hear the appeal.

Finally, in reviewing recent cases that the U.S. Supreme Court decided not to hear a case involving a school administrator's "due process" rights must be included.[7] The Tenth Circuit Court of Appeals held that an Oklahoma superintendent, who was dismissed with one year remaining on his employment contract, was entitled to procedural due process guaranteeing him "fundamentally fair" dismissal proceedings because he had a property interest in his employment contract; and the stigma of being called incompetent and willfully neglectful of his duties would deprive him of liberty and property rights by action of a governmental body. The court held that it was not "fundamentally fair" for the superintendent to have been "tried" by a biased tribunal made up of one school board member who campaigned to dismiss him and two other school board members who agreed that he should be discharged during public discussions. Despite the fact that the reasoning and conclusion in this case appear contradictory to that of the U.S. Supreme Court in a Wisconsin case involving the dismissal of striking teachers by a so-called "biased" school board, the High Court refused certiorari.

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[5] Dougherty County, Ga. Bd. of Educ. v. White, *sum*, 46 U.S.L.W 3145, *appeal filed*, 46 U.S.L.W. 3025 (U.S. July 21, 1977) (No. 77-120).

[6] Tempe Elementary Sch. Dist. v. Bernasconi, 548 F.2d 857 (9th Cir. 1977), cert. denied, 46 U.S.L.W. 3215 (U.S. Oct. 4, 1977) (No. 76-1627).

[7] Mayes v. Staton, *sum*, 46 U.S.L.W. 3117, *cert. denied*, 46 U.S.L.W. 3262 (U.S. Oct. 18, 1977) (No. 76-1625).

Whether or not these denials of certiorari by the Supreme Court settle the issues forever is, of course, debatable. Remember the University of Washington Law School "affirmative action" case that the U.S. Supreme Court refused to hear just a few years ago?[8] In that case, plaintiff DeFunis claimed he had been a victim of "reverse discrimination" in being denied admission to the law school. The Court refused to hear the case on grounds of mootness because the law school had provisionally admitted DeFunis and he was about to be graduated when his case would have been heard by the Supreme Court.

Not so, though, with a fellow by the name of Bakke who wants to attend the University of California Medical School.[9] This case leads the list of school law cases that the High Court agreed to hear. The *Bakke* case is probably the most controversial school law case that the U.S. Supreme Court will decide since the school finance case of *Rodriguez v. San Antonio.*[10] *Bakke* focuses on the constitutional or statutory validity of "affirmative action" in university admission practices. Implicitly, though, it could affect all areas of society.

Clearly, the central theme of the cases affecting public school governance that the U.S. Supreme Court has agreed to hear this term is civil rights. At least two of the cases are not truly "school law" cases. The only variation on the civil rights theme is a New York case testing the constitutional validity of a state law that would grant a one-time payment to parochial schools that would have received the payment if the original law had not been declared unconstitutional.[11] Apparently, in expectation of receiving the money under the original law, parochial schools financially obligated themselves to an extent that would not have been the case in the absence of such expectation. And the theory of relief sounds like side-door quantum meruit.

The civil rights cases begin with one that addresses itself to the issue of whether a school board is a "person" under section 1983 of the U.S. Civil Rights Act.[12] The case was brought against the New York City Board of Education by some female school employees who claimed that they were required to begin unpaid maternity leave before their doctors thought it necessary. Since the school board revised its policy at the time the case was heard permitting pregnant teachers to work as long as they were able, the trial court dismissed the suit on the theory that a school board was not

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8. DeFunis v. Odegaard, 507 P.2d 1169 (Wash. 1973), *vacated*, 416 U.S. 312 (1974).

9. Regents of Univ. of Cal. v. Bakke, 553 P.2d 1152 (Cal. 1976), *cert. granted*, 45 U.S.L.W. 3570 (U.S. Feb. 22, 1977) (No. 76-811).

10. Rodriguez v. San Antonio Independent Sch. Dist., 411 U.S. 1 (1973).

11. New York v. Cathedral Academy, 355 N.E. 2d 300 (N.Y. 1976), *appeal filed*, 45 U.S.L.W. 3347 (U.S. Oct. 29, 1976) (No. 76-616).

12. Monell v. New York Dep't of Social Services, 532 F.2d 259 (2d Cir. 1976), *cert. granted*, 45 U.S.L.W. 3508 (U.S. Jan. 25, 1977) (No. 75-1914).

a "person" under section 1983. Section 1983 is a Reconstruction statute that was given new life by the U.S. Supreme Court in 1975 in *Wood v. Strickland.*[13] The original purpose of the statute was to provide a remedy in cases in which local or state law enforcement or election officials violated a person's civil rights guaranteed by the U.S. Constitution. As a practical matter, aiming enforcement of the law at a "person" eliminated the argument that the eleventh amendment to the U.S. Constitution prohibits lawsuits against states without permission of the states. The New York trial court grounded its decision dismissing the suit on the theory that the school board is part of the state and is therefore, not within the purview of section 1983.

If the High Court concludes that a school board is a "person" under section 1983, it is most probable that in the future civil rights suits will be aimed primarily at school boards rather than individual school board members. These lawsuits will proliferate, especially if the U.S. Supreme Court agrees with a student of the Chicago public school system in the case of *Carey v. Piphus.*[14] In that case, a high school student had been suspended for 20 days, without any hearing, allegedly for smoking a marijuana cigarette. The boy denied the charge and filed a federal civil rights action. The trial court held that the plaintiff had been suspended without due process but was not entitled to any money damages other than in a nominal amount. The Seventh Circuit Court of Appeals reversed the trial court and held that public school students, suspended in violation of their 14th amendment constitutional rights of due process, were entitled to general compensatory damages, *even in the absence* of any showing of specific injury or pecuniary loss. This would open the door to a school district's treasury largely at the discretion of a federal or state trial court judge.

The third civil rights case now pending before the High Court arose in the Medical School of the University of Missouri.[15] Less than a year after her admission with advanced standing to the medical school, the plaintiff was notified that her performance was not up to the standards required of medical students. She was subsequently placed on probation and examined by a panel of physicians concerning her professional qualifications. A majority of the panel concluded that she was not qualified for graduation. This decision was reviewed by other committees of the medical school and she was ultimately dismissed. She appealed to the federal courts contending that she had not received an adequate hearing or opportunity to present her views. She also claimed that her dismissal was the result of an unfair bias based on her sex, religion, and personal appearance. The trial court ruled against her. On appeal, however, the Eighth Circuit Court reversed the trial court and held that the plaintiff was entitled to a more complete hearing than the medical school had provided because the dismissal had such grave consequences for her future. In its petition for review by the Supreme Court, the medical school called the circuit court of appeals' decision "drastic" and a threat to the academic independence of the university. Its implications for the grading and advancement of public school students are clear.

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[13] 420 U.S. 308 (1975).

[14] 545 F.2d 30 (7th Cir. 1976), *cert. granted,* 45 U.S.L.W. 3690 (U.S. Apr. 19, 1977) (No. 76-1149).

[15] Board of Curators of Univ. of Mo. v. Horowitz, 538 F.2d 1317 (8th Cir. 1976), *cert. granted,* 45 U.S.L.W. 3690 (U.S. Apr. 19, 1977) (No. 76-695).

Two other civil rights cases involved pregnant employees—one in private industry and the other in a California school system. The Richmond, California case[16] is overshadowed by the fact that a 1976 statutory amendment apparently would provide the kind of relief requested by the plaintiff. The amendment leaves it up to the teacher and her medical adviser to determine when she shall take maternity leave and requires that pregnancies be treated by school boards in the same manner as any other disability as far as leaves and benefits are concerned.

The second case, *Nashville Gas Co. v. Satty*,[17] was the subject of an interesting exchange during oral argument between Mr. Justice Blackmun and the attorney for the utility:

> Mr. Justice Blackmun: "What is the business justification for depriving a pregnant employee of seniority rights?"
>
> Wray responded that it is rational for an employer to have such a policy. Wray pointed out that absences are disruptive and that an employer need not encourage them. He added that for purposes of job-bidding, seniority employees who take leave of absence, for any other reason, such as completion of education, also lose job-bidding seniority. This seniority policy, Wray noted, merely favors employees who are actively working for the company.

It will be interesting to note whether the Court will give the same short shrift to these arguments as it did to similar arguments of school administrators in earlier pregnancy leave cases.

New cases are being filed on a regular basis with the Supreme Court. An unusual one arose in Missouri.[18] In the petition for certiorari, the University of Missouri asked the U.S. Supreme Court to review a decision by the Eighth Circuit Court of Appeals ordering the university to recognize and grant meeting space and other privileges normally accorded student groups to the Campus Gay Lib Organization. In 1971, the Campus Gay Lib Organization petitioned for recognition as a student club to provide "dialogue" on sexual life styles. The university denied the petition on the theory that recognition would "tend to increase homosexual behavior" in violation of Missouri's anti-sodomy law. The Eighth Circuit Court of Appeals disagreed with the university by holding that "the restriction on First Amendment rights . . . may be justified only by a far greater showing of a likelihood of imminent lawless action than presented here." The court also said that the university could not penalize persons "for their status rather than their conduct" under the Constitution.

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[16] Richmond Unified Sch. Dist. v. Berg, 11 FEP Cases 1285 (9th Cir. 1975), *cert. granted*, 45 U.S. L.W. 3508 (U.S. Jan. 25, 1977) (No. 75-1069).

[17] 522 F.2d 850 (6th Cir. 1975), *cert. granted*, 45 U.S.L.W. 3508 (U.S. Jan. 25, 1977) (No. 75-536).

[18] Univ. of Mo. v. Gay Lib., 45 U.S.L.W. 2600 (8th Cir. 1977), *petition for cert. filed*, 46 U.S.L.W. 3221 (U.S. Sept. 20, 1977) (No. 77-447).

Another petition for certiorari in a civil rights case could form a trilogy with the New York and Chicago cases relevant to section 1983. This case was brought by a dismissed teacher in Kansas seeking reinstatement and money damages.[19] The Tenth Circuit Court of Appeals affirmed the federal trial court's decision that reinstatement was not appropriate when a teacher's one-year employment contract was not reviewed because of budgetary problems. The appellate court reversed the lower court on the significant issue of money damages holding that teachers were entitled to money damages when their procedural due process rights to a pre-termination hearing were violated; and that the eleventh amendment does not bar money judgments against local school districts that, by virtue of state law, are empowered to sue and be sued and have tax levying authority.

Finally, the last petition to note involves the extent to which a school board must go in ensuring that a hearing take place before releasing a teacher.[20] This is an appeal from a decision by the Idaho Supreme Court holding that when a teacher walks out of a termination hearing at the outset of the hearing, any rights to a hearing are waived by the teacher.

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[19] Smalling v. Epperson, 551 F.2d 254 (10th Cir. 1977), *petition for cert. filed*, 46 U.S.L.W. 3017 (U.S. July 14, 1977) (No. 77-85).

[20] Ferguson v. Board of Trustees of Bonner County Sch. Dist. No. 82, 564 P.2d 971 (Idaho 1977), *petition for cert. filed*, 46 U.S.L.W. 3169 (U.S. Sep't. 14, 1977) (No. 77-402).

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Bad Cases Make Bad Law — Let's Improve Pre-litigation Labor Relations Practices in Schools

LARRY E. SWIFT
DIRECTOR OF POLICY DEVELOPMENT SERVICES
WASHINGTON STATE SCHOOL DIRECTORS' ASSOCIATION
OLYMPIA, WASHINGTON

No doubt by reviewing recent collective bargaining decisions, lawyers and educators can keep near the cutting edge of the law, but from the view of school board members, that is not enough. We need to influence which way that edge cuts. Mindful of the legal truism that "bad cases make bad law," it is worth spending a few moments looking at the system by which disputes wind their way to court and eventual resolution.

Several conditions lead to uneven results in school district collective bargaining cases. First, current information is hard to get. The subject area is heavily influenced by state statutes and consequently, national reporting services are minimally useful. Furthermore, there is usually only an informal communications network within a state permitting lawyers and school administrators to exchange ideas and discuss problems. Secondly, lawyers are usually self-employed entrepreneurs who depend upon their school clients to notify them in times of need. Unfortunately, a dispute is often well on its way toward an unfavorable resolution before the lawyer is called. Thirdly, in many states, collective bargaining disputes are not often handled by specialists but rather by general practitioners who do a relatively small amount of school law and labor relations work. This same condition exists for school managers who are generalists that attempt to negotiate labor contracts and then administer them as just one phase of their total job. The result of all of this is that on a statewide basis, the way that school districts are organized to bargain with their employees often leads to naive bargaining tactics, loosely-worded agreements and poor contract administration. Worse still, those disputes that do culminate in arbitration decisions, Public Employment Relations Commission (PERC) rulings and judicial opinions are often hard to live with. Bad cases make bad law.

The values of individual attorney-client relationships and school decision-making at the local district level make it difficult to build a centralized system of preventive law in the area of collective bargaining and contract management. This is particularly true in states with few metropolitan areas and many school districts with small populations. However, a system is emerging in the state of Washington that is eliminating some of the slippage. Under the general direction of C. R. Marshall, Executive Secretary of the Washington State School Directors' Association, this system may lead to an effective network of lawyers and para-legal personnel to administer disputes from their inception through formal resolution. Its principal components are the Contracted Negotiations Service, the Negotiaide Program and the Washington Council of School Attorneys. The latter is an affiliate of the School Directors' Association which provides the two negotiation services.

Washington, like many states, has a wide range in district size, organizational sophistication, and levels of collective bargaining activity. School districts range in size from 12 to 65,000 students. More than half of the districts have fewer than 1,000 students. They have few administrators and modest budgets. Thus, differentiated administrative roles are not possible and there is little money for hiring specialized consultants. Finally, the value of local control and decision-making is very strong. Therefore, if labor relations practices are to improve generally, experienced professional help must be available in a variety of forms to fit the diverse needs of districts across the state.

The major characteristics of the emerging labor relations system respond to conditions in the state by: promoting the most efficient use of human resources by permitting school administrators, paralegal personnel and lawyers to perform those tasks for which they are best suited; remaining voluntary so as not to encroach on attorney-client relationships or the management of affairs at the local level; and minimizing costs.

CONTRACTED NEGOTIATIONS SERVICE

For three years the state School Directors' Association has contracted with local school districts to provide specified negotiations services, such as preparation for, and participation at, the bargaining table and contract administration, including representation at arbitration proceedings and participation in PERC hearings. In turn, the Association contracts with individual negotiators who are then assigned four to eight school districts to represent.

Presently, about half of the negotiators are lawyers, though the trend is toward retaining nonlawyers. The role is seen as a paralegal function that helps control costs and permits differentiated use of skills. Experienced labor relations personnel can perform at-the-table bargaining as well as conventional contract administration tasks, with lawyers called upon to represent the district when litigation arises.

The Association trains the negotiators and provides periodic workshops for them. The negotiators also have constant contact with Larry Lundberg, the Association's Assistant Executive Secretary for Labor Relations who manages the program and coordinates their activities through frequent consultation. The negotiators are further supported by a labor relations information system that is continuously maintained by a full-time staff member.

Negotiators will represent four to eight districts depending upon district size, geographic proximity and length of employee contracts. The fees are purposely kept as low as possible to stimulate interest in the program and make it feasible for small districts to avail themselves of professional help throughout the labor relations process. Annual contract fees vary from $3,000 to $10,000; again, the variation depends upon the size of districts, the estimated time required to provide the services and the degree to which a local district is willing to share the negotiator's services with other districts.

Presently, more than seventy of the state's 300 districts contract for the service. The service will probably never include more than one-third of all of the districts in the state because the largest systems have their own full-time labor relations staff, many districts choose to be represented by independent negotiators with whom they have worked for several years, and the Negotiaide Program satisfies the needs of many school systems.

THE NEGOTIAIDE PROGRAM

This service is just emerging. It is similar to the Pennsylvania CALM system. For a fee of approximately $500, a school district may have its existing contract analyzed and have employee proposals, as well as its own counterproposals, reviewed. It will also receive advice regarding negotiation processes. Two or three site visits by Association labor relations staff are available. However, no at-the-table bargaining services are involved, nor would the district be represented in arbitration proceedings.

Again, the cost of the service is kept as low as possible to maximize participation. The goals are to increase the coordination of collective bargaining throughout the state and to improve the quality of all phases of employment relations practices. However, these services are not subsidized by the Association's general dues structure. In that sense, the principle of voluntariness is maintained.

THE COUNCIL OF SCHOOL ATTORNEYS

Naturally, a necessary component of this system of professional consultation is a cadre of lawyers who are experienced in both general school law and collective bargaining. There is no doubt that the field is emerging as a bona fide specialty within the general practice of law; however, outside of the large metropolitan areas, it is not possible for a lawyer's entire practice to be devoted to it. Thus, there is need for more than chance contact among lawyers throughout the state who have school systems for clients.

The Council of School Attorneys has emerged to fill the need. It has its annual meeting in conjunction with that of the School Directors' Association that brings school directors, administrators and attorneys together, in a fashion not unlike the NOLPE convention, to discuss legal issues in the state. Since its first meeting four years ago, more than half of each meeting has been devoted to labor relations topics. In addition to the annual conference, occasional meetings have been held specifically for school attorneys. Though successful, they have been few in number. However, members of the Council also receive the materials disseminated to the Association's contracted negotiators and the general information mailed to Association members, enabling them to keep up to date on a variety of issues affecting school operations.

Finally, a goal of the Council has been to share legal briefs, memorandum decisions, rulings from the bench, arbitration decisions and the plethora of materials generated by superior courts and arbitration proceedings which are not systematically reported. This objective has been difficult to achieve. Hopefully, a person with paralegal training will soon be hired to collect, catalogue and disseminate this information to members of the Council, negotiators under contract to the School Directors' Association and subscribing school districts. With that added capacity, the Council of School Attorneys should have periodic professional meetings and access to an information network that will provide members with current information with which to serve their clients at a reasonable cost even though many of them devote only a fraction of their practice to school law.

Even though a number of lawyers still represent school districts at the bargaining table, it appears that the trend is toward a system of differentiated roles. Many attorneys find collective bargaining and day-to-day contract administration terribly time consuming. Often, it is difficult to charge the client the full rate for all of the hours invested in the process and the time demands are difficult to balance with the other requirements of maintaining a legal practice. Thus, the move toward paralegal personnel in contract negotiation and administration is welcomed by many lawyers, especially when it is part of a system that establishes appropriate limits for the paralegal role and defers to the lawyer in the judicial arena.

REMAINING PROBLEMS

Lest this review sound too idyllic, it must be admitted that ample opportunity remains for poor practices and bad decisions. A most pressing problem in the state of Washington today is the clarification of the scope of bargaining. The Public Employment Relations Commission has been dilatory in clarifying disputes over mandatory subjects of bargaining. In some cases, such as the school calendar, hearing examiners have rendered decisions that have been hard to accept. However, for financial reasons, individual districts often choose not to appeal adverse decisions. As a result, there has been much discussion concerning the formation of one or more legal pools to enable school districts to share the cost of appeals.

Despite the fact that the authority for such pools seems to exist under state law, the concept seems to by stymied by the difficulty in determining which issues would be appealed and which should not. Some experience with pooling will be gained next year as school districts comply with the new unemployment compensation program. As elsewhere in the nation, school districts will participate in the system. Instead of paying the state-mandated insurance rate, many districts are electing to be self-insurors and pay their actual costs. To spread the risk, some of these are forming insurance pools. In the critical area of contesting invalid claims, this experiment will provide useful insight into the problems of operating legal pools.

Obviously, we are still experimenting with ways to improve the general level of labor relations practices. All that can be said is that a system is emerging that can improve the capacity of school districts to bargain effectively, administer their contracts evenly, and be served by lawyers who have current knowledge of legal developments within the state. Since it is a voluntary system which is depending upon extensive staff work to support contract negotiators and lawyers, it does not completely achieve its goals. However, it has gone a long way toward improving the quality of decisions made all along the line in labor relations, and it helps to influence the direction that the cutting edge of the law slices by reducing the frequency of bad cases making bad law.

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Church-State Relationship—Recent Developments

Joseph E. Bryson
Professor of Education
University of North Carolina at Greensboro

During 1976-1977 (this chapter covers the period beginning November 1, 1976 and ending October 31, 1977), church-state issues, both legislative and judicial, continued to move at a frenzied pace. According to the American Jewish Congress, there were 47 church-state cases pending in December, 1976. The cases are wide-ranging involving such issues as public aid for elementary, secondary, and higher education (the age-old question); religious practices in schools, the teaching of transcendental meditation; the distribution of bibles on public school campuses, and school boards' observance of religious holidays of employees.

The Supreme Court's major decision in *Wolman*[1] was as complex as the state statute at issue in it. This decision might signal a drift in the Supreme Court's church-state judicial philosophy established in *Cochran*,[2] *Everson*,[3] *Allen*,[4] and *Lemon I*.[5] The *Wolman* case is treated fully in this paper with a detailed table delineating statutory mandate and judicial acceptance. In the 1977 Supreme Court fall session, which began on Monday, October 3rd, the Court decided in a 6-3 decision without written opinion (Justices Brennan, Marshall, and Stevens dissenting), that North Carolina and Tennessee's statutory arrangement aiding private higher education was constitutionally permissible. The 1976 *Roemer*[6] decision did establish the Supreme Court's unique distinction between elementary and secondary schools and higher education institutions.

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[1] Wolman v. Walter, 45 U.S.L.W. 4861 (U.S. June 24, 1977) (No. 76-496).
[2] Cochran v. Louisiana State Bd. of Educ., 281 U.S. 370 (1930).
[3] Everson v. Board of Educ., 330 U.S. 1 (1947).
[4] Board of Educ. v. Allen, 392 U.S. 236 (1968)
[5] Lemon v. Kurtzman, 403 U.S. 602 (1971).
[6] Roemer v. Maryland Pub. Works Bd., 426 U.S. 736 (1976).

There was a major Fifth Circuit Court of Appeals decision concerning religious instruction. The Rhode Island Federal District Court handed down an important decision concerning a parochial aid transportation statute. While there were many important state supreme court decisions, perhaps the most important was the Missouri Supreme Court's decision in *Barrera*[7] in which Missouri Supreme Court finally solved an issue that was in litigation for six years. *Barrera* could have far-ranging implications.

This chapter follows a format established many years ago—a review of the legislative and judicial activities with an in-depth review of significant judicial decisions. My apologies are extended for any incomplete citations, case numbers, and legislative document numbers. The review is created from news media, general articles, court reporters, and friends who send information from the fifty states. If cases are recorded in the Reporter system, the citations are complete, otherwise, complete citations are absent.

STATE LEGISLATIVE AND ADMINISTRATIVE ACTIVITIES

Alaska - On November 2, 1976, Alaska voters defeated Proposition No. 4 by a 56.3 to 43.7 margin. This constitutional amendment would have provided unlimited state aid through student grants to church colleges and parochial schools.

Arizona - Local Mormon officials and Kingman City Manager have initiated an effort to bar a school play concerning biological evolution.

California - There are two bills before the California General Assembly of church-state importance: Senate Bill A. B. 1810 would provide a tax credit to parents with children in parochial schools; and Bill A. B. 1675 would authorize public school and private school agreements for outdoor science and conservation programs.

Connecticut - Despite defeat in the House Education Committee, a petition has been launched for the legislature to reconsider a bill which would require state payment for nonpublic school textbooks.

The New Hartford School Board has given its approval for Catholic students, in a a local public school, to receive Roman Catholic religious instruction in special classes. The Connecticut Civil Liberties Union has protested this practice.

Florida - In November, St. Petersburg school officials told teachers not to wear "I found it" buttons on school grounds on the grounds that such a display violates constitutional mandate of public school religious neutrality.

The Florida Department of Education has held that privately sponsored Bible study courses in certain Marion County Schools were unconstitutional. The Marion County program was unusual in that most parents were not notified that their third, fourth, and fifth graders were in the Bible instruction classes; and the school superintendent stated that he was "totally unaware of the course." The courses were taught by non-certified instructors trained by the "Ocala Bible in the Schools" group.

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[7] Mallory v. Barrera, 544 S.W. 2d 556 (Mo. 1976).

Georgia - The Muscogee Courty School Board decided in March, 1976 that morning devotionals could no longer be required. The devotional had included Bible reading and prayer. The Board insisted that while it was proper to teach about religion, it was improper to impart sectarian beliefs. Moreover, teaching the Bible and other sacred documents, as literary forms, is proper; however, the Board suggested that religious education was the responsibility of the home and church.

Illinois - In April, 1977, the legislature held hearings on H.B. 1051 which would provide tuition grants for parochial schools. It is expected to be acted on this session.

Indiana - By a 4-3 vote, the Monroe County School Board banned distribution of the Bible inside public schools by members of Gideons International.

The legislature is considering a measure to provide special state income tax credits for donations made to parochial and private schools.

Iowa - The Iowa Catholic Conference is seeking one million dollars in textbook loan aid for parochial schools.

In Dubuque, the Archdiocese was heavily involved in a school board election. Some school board candidates who are favorable to Catholic schools were endorsed at the expense of others. Church bulletin inserts, newsletters sent home with parochial students, and verbal statements from parochial school officials were among the techniques used.

Maine - The State Department of Public Instruction has halted a longstanding practice of daily religious instruction held in many northern Maine counties.

Maryland - The State Senate Finance Committee defeated a proposal for publicly supported parochial school transportation.

Massachusetts - The State Attorney General has insisted that all school districts comply with a statutory mandate, declared constitutional by a federal district court, requiring a minute of silent meditation in all schools.

Missouri - The General Assembly is considering a measure to provide special state income tax credits for donations to parochial and private schools.

Nebraska - On November 2, 1976, amendment 6(2) authorizing unlimited state aid to denominational and other private colleges was defeated by voters 53% to 47%. Amendment 6(1) allowing public school districts to contract with nonpublic schools for special education services for handicapped children passed by a 55% to 45% margin.

Nevada - The legislature is considering action authorizing silent meditation and silent prayer. Actually, no such legislative action is needed.

The State Attorney General has acknowledged that school boards may provide released time for religious instruction in off-campus settings.

New Hampshire - On June 1, 1977, the General Assembly approved a bill allowing a five-minute religious exercise period to be scheduled before the beginning of school. The religious exercise period is for those students who choose to participate.

New Jersey - A state-wide voucher plan, replacing the present method of financing the public schools, has been introduced. The plan would place $1,500 to $2,000 in the school of the parents' choice (public schools, private schools, and/or parochial schools) to be "spent" at the discretion of the school. The bill would require a state referendum.

The General Assembly also has two other bills under consideration (A-2333 and A-2293) which would provide auxiliary and diagnostic services for parochial schools.

New York - The legislature amended the state lottery statute providing $2.9 million in additional funds for textbook loans for parochial schools.

Ohio - The Ohio State School Board has insisted that the Cincinnati School Board resume public tax aid to St. Mary Roman Catholic school. The aid was cut off because of desegregation concerns by both the school board and St. Mary Roman Catholic School. The school board is involved in desegregation litigation and to continue aid to St. Mary's jeopardizes the school board's defense. St. Mary's clouded the issue when it merged with all-white Holy Cross bypassing St. Francis which is mostly black.

As a footnote to *Wolman*, the General Assembly has enacted H.B. 834 providing $44 million annually to parochial and/or private schools. The new statute provides textbook loans, diagnostic services, and testing and scoring services on parochial school campuses. The statute provides transportation for parochial students leaving the school campus for guidance and other services. The statute provides personnel to administer the program.

An interesting feature of H.B. 834 is that it includes loans for instructional materials and equipment which were declared unconstitutional in *Wolman*. Litigation has already been initiated. Perhaps Justice Powell will pay closer attention to political fragmentation on this reading.

Pennsylvania - Pennsylvania continues to have difficulty with its 1972 parochial transportation statute. The state has withheld $37,000 of transportation funds from the Springfield School District, Delaware County because the school board refuses to bus parochial students to out-of-district parochial schools. Pittsburgh's School Board has also refused to comply with the statute. Judge Theodore Rogers insisted that the statute is "about as close to extortion as you can get" and insisted that the Pittsburgh School Board continue to receive state funds until litigation involving the statute is completed.

Rhode Island - In October, 1976, Commissioner of Education Thomas C. Schmedt ruled that the Jamestown School Committee must transport students to and from a parochial school located outside the public school district.

Texas - In April, 1977, the Senate approved a statute providing parochial and/or private schools with $3.6 million for textbooks per year.

Wisconsin - A proposal calling for a constitutional amendment to legalize parochial aid for textbooks and instructional materials is expected to be introduced in the State Assembly.

FEDERAL LEGISLATIVE ACTIVITIES AND THE WASHINGTON SCENE

Alaska Senator Theodore F. Stevens has introduced Senate Bill 549 to "forgive 'the college's debts to the United States Department of Housing and Urban Development (HUD) for service payments on the school's dormitories and student union buildings." (Alaska Methodist University is the university in question and is two years behind in payments.)

Hearings on the Schweiker-Delaney tax credit deduction arrangement for federal aid to sectarian schools and colleges (Senate Bill 834 and House Bill 3403) will open in late 1977.

Alabama Senator James Allen has introduced a resolution amending the Constitution to include "voluntary, nondenominational" prayer in public schools.

Ohio Congressman Chalmers Wylie and Virginia Congressman J. Kenneth Robinson have proposed a constitutional amendment which, in substance, would be a government-sponsored prayer in public schools and other public buildings. Congressman Wylie has also introduced legislation providing federal aid to denominational and private colleges through tax credits.

Four university presidents from Catholic University, Georgetown University, American University, and George Washington University have issued a "Declaration of Independence" maintaining that their universities would refuse federal funds if "unwarranted interference in university affairs" occurred.

JUDICIAL DECISIONS

Arkansas - Arkansas statute providing state aid to higher education scholarship programs is not "establishment." *Lendall v. Cook*, 432 F. Supp. 971 (D. C. Ark. 1977).

California - The California Appeals Court has maintained that a Student Bible Club organized "[T]o know God better . . . by prayerfully studying the Bible" (membership was open to students having "genuine interest in the fulfilling" of such commitment) constitutes "establishment". *Johnson v. Huntington Beach Union High School District*, 137 Cal. Rptr. 43 (Cal. App. 1977).

Another California Appeals Court decision insists that a school board may allow "personal necessity leave" for observance of religious holidays but there is no constitutional imperative. *California Teachers Association v. Board of Trustees of the Cucamonga Elementary School District*, 138 Cal. Rptr. 817 (Cal. App. 1977).

Florida - In a very important Florida case, the Fifth Circuit Court of Appeals declared as establishment of religion a series of religious practices in Orange County. The court insisted that daily Bible reading and prayer over the public address system (also in classrooms) and distribution of Gideon Bibles violate the first and fourteenth amendments. The prayer and Bible reading is to a "captive audience." Distributing the Gideon Bible places a "stamp of approval upon the Gideon version of the Bible, thus creating an unconstitutional preference for one religion over another." The court also struck down an age-old Florida statute requiring teachers to inculcate Christian virtues on the grounds that the statute advances religion. *Meltzer v. Board of Public Instruction of Orange County*, 548 F. 2d (5th Cir. 1977).

Indiana - A controversial biology textbook, *Biology: A Search for Order in Complexity*, was ordered removed from the approved list of books in an order issued to the Indiana Textbook Commission by Superior Court Judge Michael T. Dugan in Indianapolis. The book, said Judge Dugan, clearly seeks "promotion and inclusion of fundamentalist Christian doctrine in the public schools."

Louisiana - High School Athletic Association "transfer rule" restricting eligibility of pupils who enroll in school(s) other than the pupil's attendance district "did not encroach on first amendment religious freedom." However, the rule was unconstitutional as applied to four city-wide high schools who were exempt. Thus, plaintiff was denied equal protection. *Walsh v. Louisiana High School Athletic Association* 428 F. Supp. 1261 (D. C. La. 1977).

Maryland - Another "Secular Humanism" case is developing, brought by "Parents Who Care" protesting a religion called "Secular Humanism" taught in Montgomery County Public Schools. Testimony was taken over a period of 21 months in 1973-74, covering 1,688 pages. The state school board accepted the hearing examiner's conclusions on January 2, 1977.

Massachusetts - A federal district court has insisted that the Massachusetts statute requiring public schools to provide a period of silence for prayers or meditation at the beginning of the school day does not violate first amendment establishment clause. *Gaines v. Anderson*, 421 F. Supp. 337 (D. Mass. 1976).

In April, 1977, a Springfield judge ordered the Springfield School

Board to provide transportation to children attending out-of-town parochial schools.

In November, 1976, Superior Court Judge Robert H. Beaudreau ordered Worcester School Board to lend textbooks to students attending a Schreusbury Catholic High School.

The Massachusetts Supreme Court has insisted that a statute requiring teachers to lead a class in the Pledge of Allegiance violates first amendment rights of teachers. *Opinion of The Justices to the Governor*, 363 N. E. 2d 251 (Mass. 1977).

Michigan - On September 2, 1976, State Attorney General Frank Kelly filed suit in Hillsdale County Circuit Court to stop a rural public school district from allowing religious instruction in school during regular school hours. The classes, taught by a nondenominational fundamentalist Bible mission, have been going on for 33 years.

Minnesota - On November 30, 1976, a three-judge federal court (St. Paul) declared a statute providing textbooks and instructional materials to parochial schools constitutional. *Minnesota Civil Liberties Union v. Casmey*, Civ. No. 3-76-8 (USDC Minn., Nov. 29, 1976), *vacated*, 45 U.S.L.W. 3839 (U.S. June 28, 1977) (No. 76-1144).

Missouri - In a continuing, important church-state case (all litigation to this point had been in federal courts, including the United States Supreme Court), the Missouri Supreme Court declared that: Title I funds are "public" funds, not "federal funds"—a distinction without a difference; when Title I funds are deposited with the State Treasury—"money donated" - is for public school purposes as decided by the Missouri Constitution and statutes; and use of Title I money for teachers and services (including textbooks and transportation) in parochial schools is aid to religion and is constitutionally impermissible. *Mallory v. Barrera*, 544 S. W. 2d 556 (Mo. 1976). *See also Barrera v. Wheeler*, 441 F. 2d 795 (8th Cir. 1972); *Barrera v. Wheeler*, 475 F. 2d 1338 (8th Cir. 1973); *Barrera v. Wheeler*, 945 S. Ct. 2274 (1914).

The Missouri Supreme Court has upheld the constitutionality of a financial assistance statute providing direct payment tuition grants to qualified, full-time higher education students in either public or private institutions even though most checks are made directly payable to the student and are then endorsed to the institution. The court said that this does not violate the State or United States Constitutions. *Americans United v. Rogers*, 538 S. W. 2d 711 (Mo. 1976).

On January 20, 1977, County Circuit Judge Richard Enright dismissed a "Secular Humanism" suit. Taxpayers sought property tax relief on the grounds that the public schools were teaching a godless religion known as "Secular Humanism."

New York - A New York Appeals Court dismissed a general criticism of school rules concerning religion and curriculum. *Muka v. Sturgis*, 383 N. Y. S. 2d 933 (App. Div. 1976).

In December, 1976, the Civil Liberties Union filed suit in federal district court (Brooklyn) challenging public funding for auxiliary services personnel to parochial schools.

New Jersey - On January 20, 1977, suit was filed in federal district court (Trenton) challenging legislation providing $1,000 in special state income tax exemptions to parents with children attending parochial and/or private schools.

On Thursday, October 20, 1977, Federal District Court Judge H. Curtis Meanor declared the teaching of transcendental meditation programs in public school unconstitutional. The program, funded in part by an HEW $40,000 grant, focused on the course "Science of Creative Intelligence for Secondary Education—First Year Course—Dawn of the First Year of the Age of Enlightenment." Specifically, Judge Meanor was concerned with textbook selection and the initiation ceremony called a "puja" in which barefooted students entered "incense-filled rooms."

North Carolina - On March 30, 1977, the federal district court held that North Carolina's statute providing tax aid (through students) for sectarian colleges and universities was constitutional. *Smith v. Board of Governors of the University of North Carolina*, 429 F. Supp. 871 (W.D.N.C. 1977) On October 3, 1977, the United States Supreme Court in a 6-3 decision, rejected Smith's appeal. Justices Marshall, Stevens and Brennan dissented. The Court, in the same decision, also rejected an appeal of Tennessee's Student Financial Assistance Program.

The North Carolina Civil Liberties Union has protested "sectarian instruction" in Haywood County Schools. The school board's attorney has advised that such practice is questionable.

In a federal district court case in Wilmington, a probationary vocational education teacher was dismissed because he was not properly certified and he was absent too often for religious meetings and holidays. The school board was willing to reinstate the teacher if he satisfied the conditions of the complaint. The teacher litigated on religious grounds and asked for a jury trial. The jury found for the school board. *Cressman v. Board of Education of Pender County*, Case No. 75-0034-Civ. 7.

North Dakota - The North Dakota Supreme Court has maintained that the state does not have to pay school boards fifteen cents per child for parochial school students who ride on school buses. The statute applies only to public school children. *Dickinson Public School District No. 1 v. Scott*, (N. D. 1977).

Ohio - The Ohio Supreme Court has insisted that standards for private religious schools are "so pervasive and all encompassing that total compliance with each and every standard by a nonpublic school would effectively eradicate the distinction between public and nonpublic education."

Thus the state standard "unduly burdens the free exercise of religion." *State v. Whisner*, 351 N. E. 2d 750 (Ohio 1976).

Pennsylvania - State Legislative and Administrative Activities section for judicial involvement concerning Springfield and Pittsburgh School Boards and the state's efforts to force the school districts to provide transportation to students attending out-of-district parochial schools.

Pennsylvania's Nonpublic Elementary and Secondary Statute was declared constitutional as applied to private nonsectarian schools. *Commonwealth Department of Education v. The First School*, (Pa. Super. 1977). *See Meek v. Pittenger*, 441 U.S. 349 (1975), as applied to sectarian schools.

In an interesting suit brought by Americans United in which the issue concerns the federal government giving a 77 acre campus to a Bible College and Seminary, jurisdiction has been transferred from a Washington federal district court to a Philadelphia federal district court.

South Dakota - The South Dakota Supreme Court declared a General Assembly statute providing "loan free textbooks to a value of $15.00 per pupil" unconstitutional as violative of the state constitution. The "child benefit" theory was specifically rejected. *McDonald v. School Board of Yankton*, 246 N. W. 2d 93 (S. D. 1976).

Rhode Island - In an important case, a Rhode Island Federal District Court Judge Raymond J. Pettive insisted that features of the transportation statute aiding parochial schools did advance religion. Judge Pettive maintained that "[w]here, as here, the effect of those schemes is inescapably to aid sectarian schools, they will be struck down." Also, said Judge Pettive, the statute impermissibly entangles church and state and provides "successive opportunities for political fragmentation and division along religious lines . . . ". *Members of Jamestown School Committee v. Schmidt*, 427 Supp. 1338 (D.R.I. 1977).

Tennessee - The Tennessee Student Assistant Program for Higher Education is not "establishment." *Americans United for Separation of Church and State v. Blanton*, 433 F. Supp. 97 (D. Tenn. 1977). The United State Supreme Court rejected an appeal on October 3, 1977 by a 6-3 vote with Justices Brennan, Marshall, and Stevens dissenting.

Utah - In April, 1977 the Utah Civil Liberties Union initiated litigation in federal district court seeking to eliminate the state's "released time" program. The Utah plan encapsulates 39 of 40 school districts which provide scholastic credit for Old or New Testament courses taken during school hours at Mormon seminaries. Specifically, the judicial challenger contends that off-campus Bible courses are taught from the Mormon perspective and give legitimacy to only one religious belief.

Washington - Judge Hewitt Henry dismissed legal action seeking to force the Attorney General to recover $845,455 of state money paid illegally to sectarian colleges. A state-wide referendum was held and an amendment favored by the Attorney General was defeated 60% to 40%. Judge Henry insisted "a public attorney is not liable to taxpayers for either malpractice or willful refusal to perform his dutes." *Berge v. Gorton*.

Litigation has been initiated by a dismissed math teacher against the Bridgeport School District. The school board dismised the teacher for missing too many school days among other reasons. The teacher indicated that the absences were for religious purposes. The U. S. Office of Civil Rights is also supporting the teacher.

Wisconsin - Even though a state transportation statute concerning parochial children should be liberally construed, it was held unnecessary to go 130 feet beyond five mile school district boundaries to dispatch children to parochial schools. *Young v. Board of Education Joint District No. 10 of Village of Mukwonago*, 246 N. W. 2d 230 (Wis. 1976).

SELECTED CASE: *Wolman v. Walter*[8]

This case, decided June 24, 1977, arrived on appeal from the Federal District Court for the Southern District of Ohio challenging the constitutionality of Ohio Rev. Code § 3317.06 (Supp. 1976) and all the provisions thereof authorizing financial aid to sectarian schools. The statute specifically authorizes: the purchase of secular textbooks that are used in public schools and approved by the school superintendent for loan to pupils or parents on request made to the nonpublic school;[9] standardized tests and scoring services for sectarian schools;[10] speech and hearing diagnostic services, diagnostic psychological services (personnel being local school board employees) and physician's services with all treatment administered at sectarian schools' discretion;[11] specialized therapeutic, guidance, and remedial services by employees of local school boards and/or State Department of Health) administered in public schools, public centers, or in secular mobile units located off sectarian school premises;[12] the purchase and loan to pupils or parents of instructional material and equipment (same materials used in public schools) that are "incapable of diversion to religious use;"[13] transportation for field trips identical to public schools.[14] § 3317.06 (E) authorizing public-funded physician, nursing, dental and optometric services was not challenged.

The federal district court approved the constitutionality of textbooks; standardized testing and scoring services; and diagnostic, therapeutic, and remedial services. It adjudged the provisions for instructional materials, equipment, and field trips unconstitutional.

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[8] 45 U.S.L.W. 4861 (U.S. June 24, 1977) (No. 76-496).

[9] Ohio Rev. Code Ann. § 3317.06(A) (Page Supp. 1976).

[10] *Id.* § 3317.06 (J).

[11] *Id.* §§ 3317.06 (D), (F).

[12] *Id.* §§ 3317.06 (G), (H), (I), (K).

[13] *Id.* §§ 3317.06 (B), (C).

[14] *Id.* § 3317.06 (L)

The district court had temporarily restrained the expenditure of any funds or any other implementation of § 3317.06. However, by consent of all parties, the three-judge court modified the restraining order to permit the expenditure of funds to purchase textbooks and lend them to pupils or their parents. The United States Supreme Court reversed the decision of the district court in part and confirmed it in part. *See* Table A *infra* for a breakdown of the votes of the Justices on each provision.

Mr. Justice Blackmun (this is Justice Blackmun's second major church-state case), writing for the Court, briefly examined the history of the questionable statute in view of *Meek v. Pittenger.*[15] Initial biennial funding for § 3317.06 was $80 million. Ohio has 720 chartered nonpublic schools. Of these, 29 schools are secular (4% of the school population). Of the 96% of the school population attending the 691 sectarian schools, 92% of the children attend Catholic schools. There was no question of civil rights discrimination.

Justice Blackmun again recognized the historical tri-part test. He dismissed the "first prong" secular legislative purposes as not applicable. "We are satisfied that the challenged statute reflects Ohio's legitimate interest in protecting the health of its young and in providing a fertile educational environment for all the school children of the State.[16] However, Justice Blackmun acknowledged that "effect and entanglement" are the difficult properties.[17] Moreover, each mandate of the statute must be examined against "firmly rooted" precedents.[18]

§ 3317.06 (A)—Purchase of Secular Textbooks

Justice Blackmun recognized the "striking resemblance" of the statute to the systems approved in *Board of Education v. Allen*[19] and *Meek v. Pittenger*[20] in the definition of "textbook" as "any book or book substitute" which perhaps is a distinction without a difference when the statute is totally considered. Thus, said Justice Blackmun "§ 3317.06 (A) is constitutional."[21]

§ 3317.06 (J)—Testing and Scoring

This section concerning testing and scoring passes constitutional muster because: no money flows either to the sectarian school or the parents; the tests are commercial, standardized achievement tests and are graded by the commercial firm so that no sectarian school teachers are involved and the tests are free of religious instruction; and the state has a legitimate concern with quality and standards of instruction.[22]

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[15] 421 U. S. 349 (1975).
[16] Wolman v. Walter 45 U.S.L.W. 4861, 4862 (U.S. June 24, 1977) (No. 76-496).
[17] *Id.*
[18] *Id.* at 4863.
[19] 392 U.S. 236 (1968).
[20] 421 U.S. 349 (1975).
[21] Wolman v. Walter, 45 U.S.L.W. 4861, 4863 (U.S. June 24, 1977) (No. 76-496).

§ 3317.06 (D) and (F)—Diagnostic Services

Justice Blackmun insisted that both § (D) concerning speech and hearing diagnostic services and § (F) concerning diagnostic psychological services were constitutionally permissible. His reasoning is that such services are general health services to the child which are constitutionally permissible; diagnostic services differ considerably from teaching and counseling in that they have very little educational substance[23]; and limited contact with children in a diagnostic relationship simply does not provide much opportunity to espouse sectarian views. Thus, says Justice Blackmun, §§ (D) and (F) "will not be impermissible entanglement."[24]

§§ 3317.06 (G), (H), (I), and (K)—Therapeutic, Guidance, and Remedial Services

The above services were provided in public schools, public centers, or mobile units located off nonpublic school premises. Transportation was provided where needed to appropriate diagnostic sites. Personnel providing services were school board employees. Appellants specifically worried about the "situation where a facility is used to service only nonpublic school students."[25] Again, Justice Blackmun called attention to the differences between *Meek*[26] and *Lemon I*[27] and the present circumstances. Justice Blackmun concluded "that providing therapeutic and remedial services at neutral sites" off nonpublic school premises does not either advance religion or create excessive entanglement between church and state. Thus, "Sections 3317.06 (G), (H), (I), and (K) are constitutional."[28]

§§ 3317.06 (D) and (C)—Instructional Materials and Equipment

These sections provide instructional materials and equipment loans directly to pupils and/or parents instead of directly to sectarian and/or nonpublic schools, which was the focus of *Meek*. However, Justice Blackmun, after a brief historical review of the Ohio General Assembly's efforts to aid nonpublic schools and a review of *Meek* concerning this issue), said that "(d)espite technical changes in legal bailee, the program and substance is the same as before. . . . In view of the impossibility of separating the secular education function from the sectarian, the state aid inevitably flows in part in support of the religious role of the schools."[29] Thus, §§ 3317.06 (B) and (C) advance the sectarian enterprise and, therefore, are unconstitutional.[30]

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[22] *Id.* at 4863, 4864.

[23] For substantive differences, *see* Meek v. Pittenger, 421 U.S. 349, 364 (1975); Public Funds for Public Schools v. Marburger, 358 F. Supp. 29 (D.N.J. 1973), *aff'd*, 497 U.S. 961 (1974).

[24] Wolman v. Walter, 45 U.S.L.W. 4861, 4865 (U.S. June 24, 1977) (No. 76-496).

[25] Meek v. Pittenger, 421 U.S. 349 (1975)

[26] *Id.* Meek v. Pittenger, 421 U.S. 349 (1975).

[27] Loman v. Kurtzman, 403 U.S. 602 (1971).

[28] Wolman v. Walter, 45 U.S.L.W. 4861, 4866 (U.S. June 24, 1977) (No. 76-496).

§ 3317.06 (L)—Field Trips

This section seeks to provide field trip transportation for sectarian schools similar to that provided to public schools. No restrictions (except similarity to public school field trips) were established and non-public school teachers make the decisions concerning destination, frequency, and timing. Justice Blackmun reviewed *Everson*[31] and suggested that travel in *Everson* "was unrelated to any aspect of the curriculum."[32] Field trips, Justice Blackmun insisted, "are an integral part of the education experience ... (and) must be treated as was the funding of maps and charts in *Meek* . . . the funding of buildings and tuition in . . . *Nyquist* . . . and the funding of teacher prepared tests in *Levitt* . . . "[33] Thus, § 3317.06 (L) advances religion and is constitutionally impermissible.

Justices Brennan, Marshall, Powell, and Stevens filed opinions, concurring in part and dissenting in part. Table A, as indicated, precisely delineates how the individual Justices decided particulars of the statute. An apparent drift in judicial philosophy concerning church and state appears to be developing among some members of the Court.

Mr. Justice Brennan:

Justice Brennan insisted that the entire statute entangled the "establishment clause." While recognizing the Ohio General Assembly's efforts to fashion a statute that avoided conflict, Justice Brennan maintained that "The (First) Amendment nullifies sophisticated as well as simple-minded . . . " attempts to avoid its prohibitions . . . and, in any event, ingenuity in draftsmanship cannot obscure the fact that this subsidy to sectarian schools amounts to $88,800,000 (less) now the sums appropriated to finance §§ 3317.06 (B) and (C) which today are invalidated just for the initial biennium."[34]

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[29] *Id.*
[30] *Id.* at 4867.
[31] Everson v. Board of Education, 330 U.S. 1 (1947).
[32] Wolman v. Walter, 45 U.S.L.W. 4861, 4867 (U.S. June 24, 1977) (No. 76-496).
[33] *Id.*

Mr. Justice Marshall:

Table A indicates that Justice Marshall joined the Court's majority on Parts I, V, VII, VIII and § (G) only on Part VI. The Court had lumped (G), (H), (I), and (K) under the broad rubric of the therapeutic services in Part VI. (I have acceded to Justice Marshall's distinction concerning (G) in Part VI in establishing Table A.) Therefore, Part VI (G), (H), (I), and (K) are set up separately. The (G) section provides therapeutic, psychological, speech and hearing services. Such services differ, insisted Justice Marshall, from those authorized under (H), (I), and (K) providing guidance and counseling services directly tc support programs of sectarian schools and providing specialized teachers for disabled children. The therapeutic services under (H), (I), and (K), said Justice Marshall, "are clearly intended to aid the sectarian schools . . . "[35] Moreover, Justice Marshall indicated that he was now ready to reverse *Allen*.[36] Calling attendtion to Justice Blackmun's remark that a tension existed between *Allen* and *Meek*, Justice Marshall maintained that he would "resolve that tension by overruling *Allen*."[37]

> I am now convinced that *Allen* is largely responsible for reducing the "high and impregnable" wall between church and state . . . by overruling *Allen*, we could free ourselves to draw a line between acceptable and unacceptable forms of aid . . . that line . . . should be placed between general welfare programs . . . and programs of educational assistance.[38]

If such imperatives develop, insisted Justice Marshall, political disputes that divide people along religious lines would disappear.

Mr. Justice Powell:

Justice Powell, concurring in part and dissenting in part (*see* Table A), appears to be drifting towards a different judicial philosophical direction than indicated in earlier decisions.[39] Perhaps Justice Burger's influence is becoming heavy. Justice Powell is concerned with state funds finding appropriate methods to aid children in sectarian settings without violating the "establishment clause." He considers such aid "in the public interest." He implies that American children should have some alternatives to public education and parochial schools provide such opportunities. Moreover, public schools should have competition and parochial schools provide competition. Also, maintained Justice Powell, a parochial school "relieves substantially the tax burden incidental to the operation of public schools."[40] He does not feel that at this point in the Twentieth Century "there are significant dangers to the establishment clause." Finally, he perceives that "deep political divisions along religious lines (are) remote . . . "[41]

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[34] *Id.* at 4868.
[35] *Id.* at 4869.
[36] Board of Education v. Allen, 392 U. S. 236 (1968).
[37] Wolman v. Walter, 45 U.S.L.W. 4861, 4869 (U.S. June 24, 1977) (No. 76-496).
[38] *Id.*
[39] *See* Committee for Public Education v. Nyquist, 413 U.S. 756 (1973).

Mr. Justice Stevens:

Justice Stevens likewise concurred in part and dissented in part (*see* Table A). Quoting from the illustrious Clarence Darrow's argument in *Scopes*,[42] Justice Stevens insisted that:

> 'The realm of religion . . . is where knowledge leaves off, and where faith begins, and it never has needed the arm of the State for support, and wherever it has received it, it has harmed both the public and the religion that it would pretend to serve.'[43]

Moreover, said Justice Stevens, there is no fundamental difference between direct and indirect aid, and no difference between textbooks and instructional materials like maps and globes. For that reason Justice Stevens would reject the "tri-part test" and adopt Justice Black's test enunciated in *Everson:*

> No tax in any amount, large or small, can be levied to support any religious activity or institutions, whatever they may be called, by whatever form they may adopt to teach or practice religion.[44]

Furthermore, said Justice Stevens, "This Court's efforts to improve on the *Everson* test have not proven successful. 'Corrosive precedents' have left us without firm principles on which to decide these cases . . . States have been encouraged to search for new ways of achieving forbidden ends."[45] Finally, Justice Stevens insisted the "high and impregnable" wall "had been reduced to a blurred, indistinct, and variable barrier" and served neither the church nor the public.[46]

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[40] Wolman v. Walter, 45 U.S.L.W. 4861, 4870 (U.S. June 24, 1977) (No. 76-496).
[41] *Id.*
[42] Scopes v. State, 289 S. W. 363 (1927).
[43] Wolman v. Walters, 45 U.S.L.W. 4861, 4870 (U.S. June 24, 1977) (No. 76-496).
[44] *Id.*
[45] *Id.* at 4871.
[46] *Id.*

TABLE A
VOTING BREAKDOWN OF JUSTICES ON THE STATUTE

Justices	Part I General History Review concerning church-state	Part II Establishment Clause—Secular purpose	Part III Textbooks Section 3317.06 (H)	Part IV Testing & Scoring Section 3317.06 (J)	Part V Diagnostic Services, Hearing, & Psychology Section 3317.06 (D) (F)	VI Therapeutic Services—Guidance & Remedial Section 3317.06 (H) (I) (K)	Part VI (G) Therapeutic Services—Guidance & Remedial Section 3317.06 (G)	Part VII Instruction Materials & Equipment Section 3317.06 (B) (C)	Part VIII Field Trips Section 3317.06 (L)
J. Burger	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
J. Blackmun	Yes	Yes	No	No	Yes	Yes	Yes	No	No
J. Brennan	Yes	No	No	No	No	No	No	No	No
J. Marshall	Yes	No	No	No	Yes	No	Yes	No	No
J. Powell	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes
J. Stevens	Yes	No	No	No	Yes	Yes	Yes	No	No
J. Stewart	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No
J. Rhenquist	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
J. White	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
	9-0	6-3 that the statute Section 3317.06 has a secular legislative purpose	5-4 for Textbooks as Constitutional	5-4 for Testing & Scoring as administered content are constitutional	8-1 for Diagnostic Services as administered are constitutional	7-2 for Therapeutic Services as administered are constitutional	8-1 for Therapeutic Services as administered are constitutional	6-3 against Instruction Materials & Equipment unconstitutional as advancing religion	5-4 against Field trips are unconstitutional as advancing religion

(Justice Marshall separated Part VI (G) from Part VI (H), (I), and (K). In setting up the table I followed his directive.)

SUMMARY AND CONCLUSIONS

The past year continued an intensified pace in church-state judicial and legislative activities. Legislative activities almost always induce new judicial involvement. The Ohio General Assembly's activity resulting in the *Wolman* decision is a prime example. The state supreme courts and the federal district and appeal courts are acting with greater intensity and responsiveness. The Missouri Supreme Court in *Barrera* - Title I funds are "money donated" for public school purpose as decided by state constitutions—is a significant decision and plows new ground.

Overshadowing all church-state activities in the 1976-77 months reported in this chapter was the Supreme Court's *Wolman* decision. This was Justice Blackmun's second major church-state decision and was as confusing as his first in *Roemer*. The Ohio statute was complex, and the Court's Justices lined up on many sides of the issues. The Court seems to be moving without leadership and confidence. Certainly the clear position of *Lemon I* and that "red letter day" June 25, 1973, *Nyguist*, *Levitt*[47] and the imperative of *Meek* have given away to the marshmallow of *Wolman*.

The dissenting opinions in *Wolman* are important. Justice Marshall is ready to reverse *Allen*. Justice Stevens (who may provide new leadership missing since Justice Douglas' retirement) would replace the tri-part test with Justice Black's enunciation in *Everson* of " . . . no tax in any amount . . . " for parochial schools. Justice Brennan's position is certainly clear—the entire Ohio statute was entanglement. Justice Powell seems caught in the vortex of indecision and change. His colloquy concerning political divisiveness and the virtues of parochial schools smacks of shallow judicial pragmatism that must be squared with future church-state decisions. There is no longer any doubt concerning the Supreme Court's position on higher education. Its decisions are real enough. As one reads Justice Blackmun's decision in *Roemer*, advancement and excessive entanglement will be difficult to establish.

Perhaps *Wolman's* significance signals a period of confusion and frustration. Regardless, there are major cases to be decided by the Supreme Court during the 1977-78 session.

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[47] Levitt v. Committee for Public Education, 413 U.S. 472 (1973).

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Some Observations Regarding Recent Court Decisions on Collective Bargaining in the Public Sector from an Educator's Perspective

Bobby D. Anderson
Associate Dean of the Graduate School
Professor of Educational Administration
University of Southern Mississippi

There are many groups interested in exercising the educational decision-making powers. School boards, administrators, teachers, community leaders, parents, students, athletic booster clubs, band booster clubs, legislatures and others could be named. All of these groups have some input into the final decisions that are made.

The history of education adequately demonstrates the long prevalent and continuing struggle at the local level between boards of education, as a group, to control all aspects of the public school absolutely and unilaterally, and teachers, as another group, to share in the decision-making process. Previous to the time that teachers organized into unions or associations, the outcome of the struggle between these two groups was never in doubt. With the advent of teachers' associations and unions, the absolute authority of boards to develop policy for the school in a unilateral manner has evolved into bilateral policy development through collective bargaining. That is not to say that the other groups have been eliminated from the decision-making process completely.

The boundary lines between the power of the board and the power of the teachers, constituting a union or association, are often undefined or vaguely defined. There is no National Labor Relations Act with a Taft-Hartley Amendment for educators. The attempt by courts and legislatures adequately to define the boundaries and the continuing struggle for power has implications for the teacher and for the school, as an institution serving society.

The writer will use three recent court decisions on collective bargaining involving teachers in discussing educational implications under the headings of academic freedom, freedom of speech for the teacher as a citizen, and the teacher as a role-model for students.

ACADEMIC FREEDOM

The first amendment to the United States Constitution does not explicitly recognize a specific freedom to teach. But the first amendment references to freedom of speech and freedom of the press were implemented to provide for the free exchange of ideas without governmental control. Academic freedom is the adaptation of those specific constitutional rights to protect communication in the classroom.

There seems to be no doubt that academic freedom exists for professors in the colleges and universities. In a New York case concerned with state teacher loyalty laws and regulations, Justice Brennan said:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.[1] In *Sweezy v. New Hampshire,* the Court said:
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> The essentiality of freedom in the community of American Universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our nation. . . .Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.[2]

Does academic freedom prevail for teachers in the public schools? In the *Tinker* case, the Supreme Court said, "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[3]

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1. Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).
2. Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).
3. Tinker v. Des Moines, 393 U.S. 503 (1969).

The First Circuit Court of Appeals decided an academic freedom public school case in 1971.[4] According to the court, free speech does not grant teachers a license to say or write in class whatever they may feel like writing or saying. The propriety of regulations or sanctions must depend on such circumstances as the age and sophistication of the students, the closeness of the relation between the specific technique used and some concededly valid educational objective, and the context and manner of presentation. The court felt that a "balancing test" should be used whereby a judge considers each case individually and determines whether the legitimate interests of the school authorities are demonstrably sufficient.[5] Both the circuit court and the United States Supreme Court made it clear that academic freedom does exist for teachers in the public schools.

In a recent case involving collective bargaining, a federal district court decided that a teacher may shed his constitutional rights under the first amendment through a negotiated agreement.[6] The case involved several senior high school English teachers that belonged to the Aurora Education Association (AEA). The AEA had negotiated an agreement which provided that the board had the right to determine the processes, techniques, methods and means of teaching any and all subjects. The board had agreed to respect the professional views of the teachers, but in the event of a conflict, the teachers had agreed in the negotiated contract to accept the directions of the school board.

The disagreement arose when the school board disapproved of ten books on a list of textbooks and supplementary materials that was submitted for approval for use in the eleventh and twelfth grade literature classes. The teachers brought suit asserting that they had a constitutionally protected right to select teaching materials for their courses on the basis of their professional judgment as to the appropriateness of the materials for the subject of the courses and the ability of the students.

In granting the defendant school board's motion for summary judgment, the court said:

> But for the bargained agreement, the plaintiffs would prevail here. The selection of the subject books as material for these elective courses in these grades is clearly within the protected area recognized as academic freedom. . . . Because of the bargained agreement, the plaintiffs' claims must be denied. Whatever may be the scope of the protection of the First and Fourteenth Amendments for a freedom to communicate with students, directly in classroom speech or indirectly through

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[4] Mailloux v. Kiley, 448 F.2d 1242 (1st Cir. 1971).

[5] *Id.* at 1243.

[6] Cary v. Board of Educ. of the Adams-Arapahoe Sch. Dist. 28-J, 427 F. Supp. 945 (D.C. Colo. 1977).

> reading assignments, such protection does not present a legal impediment to the freedom to contract. Thus, a teacher may bargain away the freedom to communicate in her official role in the same manner as an editorial writer who agrees to write the views of a publisher or an actor who contracts to speak the author's script. One can, for consideration, agree to teach according to direction.[7]

Teachers have complained for decades about school management-imposed rules and regulations. They should be careful that through collective bargaining they do not substitute unwanted teacher-imposed rules and regulations for those formerly imposed by administrators and school boards.

FREEDOM OF SPEECH FOR THE TEACHER AS A CITIZEN

Many of those who have advocated the forming of teacher unions argue that the right of free speech is not universally enjoyed by teachers. These advocates claim that this restriction is especially applicable to probationary teachers. Their argument is that only through organization and the collective bargaining process will teachers be able to progress from second class citizens to first class citizens in this important area.

The United States Supreme Court dealt with the right of a teacher to speak freely outside the classroom in a 1968 case.[8] The Court concluded that a state, acting as an employer, cannot regulate the speech of its employees significantly differently from the speech of citizens in general. The state must arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern, and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees.

This ruling has enabled teachers to be more active and vocal in the public discussion of educational issues, even though criticism may be leveled against boards of education and school administrators in the process.

In a recent case involving collective bargaining, a teacher union brought suit in an attempt to prohibit teachers from freely expressing their views at a public school board meeting if the speech pertained to collective bargaining negotiations.[9]

Wisconsin law permits inclusion of "fair share" (agency shop) provisions in municipal employee collective-bargaining agreements. While negotiations were taking place between the City of Madison School

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[7] *Id.* at 955.

[8] Pickering v. Board of Educ. of Township H.S. Dist. 205, 391 U.S. 563 (1968).

[9] Madison Joint Sch. Dist. v. Wisconsin Employment Relations Commission, 429 U.S. 167 (1976).

District and the Madison Teachers, Inc. (a labor union) for renewal of a collective bargaining agreement, the board held a public meeting at which it permitted a teacher, who was not a member of the union, to speak for approximately two and one-half minutes on the subject of the "fair share" issue.

The union filed a complaint with the Wisonsin Employment Relations Commission (WERC) claiming that the board had engaged in negotiations with a member of a bargaining unit other than the exclusive bargaining representative. The Commission found the board guilty of the prohibited practice and ordered that the board cease and desist from permitting employees, other than representatives of the union, to appear and speak at school board meetings on matters subject to collective bargaining.

The Circuit Court of Dane County, Wisconsin upheld the decision of the WERC. The Wisconsin Supreme Court affirmed the decision of the circuit court. The United States Supreme Court reversed the Wisconsin Supreme Court and remanded the case.

The United States Supreme Court decided that a state (and by implication school officials and administrators) may not prohibit teachers, other than union representatives, from speaking at an open meeting even if such speech pertains to pending collective bargaining negotiations.

The Court concluded that since the board meeting was open to the public, the nonunion teacher addressed the board, not merely as an employee, but also as a concerned citizen. When the board has opened its meeting for direct citizen involvement, it may not exclude teachers. Exclusion would violate the first amendment rights of the teacher.

That a person should not get something for nothing is readily acceptable. Therefore, an "agency fee" seems reasonable for nonunion teachers who receive benefits from collective bargaining; but it does not follow that the opportunity to speak out against the practice, in a forum that might result in change, should be denied the nonunion teacher. Individuals who do not represent the desires of teachers should not be allowed to attain leadership positions within the teacher organization.

THE TEACHER AS A ROLE-MODEL FOR STUDENTS

The Gallup Poll of the public's attitudes toward the public schools for 1976 indicated that the ideal teacher, in effect, is one who becomes a model of behavior for the young.[10]

The United States Supreme Court has said: "There is no doubt of the right of a state to investigate the competence and fitness of those whom it hires to teach in its schools."[11] A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern.[12] There is no requirement in the Federal Constitution that a teacher's classroom conduct be the sole basis for determining his fitness. Fitness for teaching depends on a broad range of factors.[13] Considered as undesirable traits in teachers are: immorality, intemperance, cruelty, mental derangement, persistent and willful violation of the school laws, conduct unbecoming a teacher, unprofessional conduct, or other good cause.

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[10] G. H. Gallup *Eighth Annual Gallup Poll of the Public's Attitudes Toward the Public Schools*, 58 Phi Delta Kappan 195 (Oct. 1976).

Fortunately, requirements for qualifying as a teacher have changed in some instances. Teachers are no longer required to agree to contract terms in which they promise to abstain from dancing, dressing fashionably, dating, falling in love and marrying, and generally accepted activities in which other members of society participate. This is as it should be.

Teachers and schools teach ethics and values every day of the school year by word, example, appearance, the way the school is structured, and classroom environment. What is expected of students and what is demanded of students indicate values. The way teachers, administrators, school board members and other school employees interact with students teaches ethical or moral values by example.

Teachers have also won the right to comment, as citizens, on the activities of their boards and administrations when the statements do not impede the teacher's proper performance of his daily duties in the classroom or interfere with the regular operation of the schools.[14] Teachers also have the right to organize to bargain collectively without fearing for their jobs.[15]

Laws denying teachers the right to strike have repeatedly been upheld in the courts.[16] However, the strike, as a method of enforcing teacher priorities, is still being used and has some educational implications. Since the vast majority of teacher strikes occur in states which by law prohibit strikes by public employees, the teacher as a role-model faces a dilemma. It is doubtful that respect for law and order can be taught by those who do not practice it. If a strike is thought of as a protest and if the teachers receive a pay raise because of the protest, then an example has been set.

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[11] Shelton v. Tucker, 364 U.S. 479, 485 (1960).

[12] Adler v. Board of Educ., 342 U.S. 485, 493 (1952).

[13] Beilan v. Board of Educ., 357 U.S. 399, 406 (1958).

[14] Pickering v. Board of Educ. 391 U.S. 563, (1968).

[15] McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968); American Federation of State, County and Municipal Employees, AFL-CIO v. Woodward, 406 F. 2d 137 (8th Cir. 1969); Hanover Township Federation of Teachers v. Hanover Common Sch. Corp., 318 F. Supp. 757 (N.D. Ind. 1970).

[16] Lawson v. Board of Educ. of Vestal Cent. Sch. Dist. No. 1, 315 N.Y.S.2d 877 (App. Div. 1970); Board of Educ. v. N.J. Educational Assoc., 247 A.2d 867 (N.J. 1968); Pinellas County Classroom Teachers Assoc. v. Board of Pub. Instruction, 214 So. 2d 34 (Fla. 1968).

In a recent collective bargaining case, after negotiations for the renewal of a contract failed to produce agreement, teachers in the Hortonville, Wisconsin Joint School District went on strike in direct violation of state law.[17] After hearings were granted that, according to the Court, satisfied due process of law requirements, the teachers were fired. The teachers brought suit against the board.

The state trial court had ruled for the board in granting a motion for summary judgment. The Wisconsin Supreme Court reversed holding that the board was not an impartial decision-maker. The United States Supreme Court reversed the Wisconsin Supreme Court and remanded the case.

According to the United States Supreme Court, state law vests the governmental, or policymaking, function exclusively in the school board and the state has two interests in keeping it there. First, the board is the body with overall responsibility for the governance of the school district; it must cope with the myriad day-to-day problems of a modern public school system including the severe consequences of a teachers' strike; by virtue of electing them, the constituents have declared the board members qualified to deal with these problems, and they are accountable to the voters for the manner in which they perform. Second, the state legislature has given to the board the power to employ and dismiss teachers as a part of the balance it has struck in the area of municipal labor relations; and altering those statutory powers as a matter of federal due process clearly changes that balance. Permitting the board to make the decision at issue here preserves its control over school district affairs, leaves the balance of power in labor relations where the state legislature struck it, and assures that the decision whether to dismiss the teachers will be made by the body responsible for that decision under state law.[18]

There were fewer teacher strikes reported in the fall of 1977 than the fall of 1976. Whether the lower number was due primarily to the decision made by the United States Supreme Court in the *Hortonville* case or to the increased sophistication of teachers at the bargaining table is debatable.

CONCLUSION

The assumption that teacher associations and teacher unions are here to stay is readily accepted. The National Education Association, with approximately 1.8 million members, and the American Federation of Teachers with approximately 420,000 members, constitute about 80 per-

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17. Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Assoc. 426 U.S. 482 (1976).
18. *Id.* at 495.

cent of America's teachers. Both groups have not hesitated to use the strike when they felt it necessary to achieve improvement in salary and fringe benefits, class size, discipline and other areas.

State legislatures, which obviously have an interest in the teaching of "good" citizenship practices in the public schools, should take action to provide a mechanism by which teachers can have significant input in the decision-making process and resolve disputes within the guidelines of the law.

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10

New Rules of Evidence in School Desegregation Cases before the United States Supreme Court

FRANK BROWN
DEPARTMENT OF EDUCATIONAL ADMINISTRATION
SUNY AT BUFFALO

There has been much concern in and out of the legal profession about the liberal/conservative orientation of the Burger Court. Indeed, just a year ago I concluded that the jury was still out on the Burger Court; and that the Burger Court had not differed too much from the Warren Court.[1] At that time major court cases on school integration were still before the Court. However, those cases have now been ruled on by the Court in one form or another. In addition, several writers and groups apparently waiting on cumulative data from the Burger Court have rendered opinions about its liberal/conservative orientation. For example, Chase and Ducat in the 13th edition of Edward S. Corwin's *The Constitution and What It Means Today* labeled the Warren Court a second revolution in relation to its interpretations of the Bill of Rights and the fourteenth amendment; but labeled the Burger Court as soft around the edges on racial equality in the public and private sectors.[2] LaMorte assessed the Burger Court's attitude toward school integration and concluded that the Burger Court was liberal on the issue.[3] However, it must be mentioned that LaMorte reviewed Court decisions regarding de jure segregation in the south where the federal government, via the United States Justice Department, has standing to bring suits against segregated school districts on behalf of plaintiffs. This situation must be compared to de facto segregated school districts in the north where the Justice Department does not have standing to bring suits on behalf of plaintiffs. In the north, parents have to institute suit and pay court expenses for cases against segregated school districts. The existence of this difference between school integration suits in the south and those in the north would tend to make the Burger Court's school integration decisions in the north a better indicator of its liberal/conservative trend. The Society of American Law Teachers gave the Burger Court a very conservative rating in the area of individual and human rights. The Law Teachers stated:

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[1] Brown, *The Equal Protection Clause, School Integration, and the Burger Court*, Current Legal Issues in Education (M. A. McGhehey ed., National Organization on Legal Problems of Education, 1977).

[2] H. W. Chase & C. R. Ducat, Edward S. Corwin's The Constitution and What It Means Today, 245 (13th ed., Princeton University Press, 1975).

[3] M. W. LaMorte, The Burger Court: Its Liberal/Conservative Attitude Toward Educational Issues (a paper presented at the Annual Conference of the American Educational Research Association in New York City, April, 1977).

> That there is indeed a pattern, and that it is more than accidental seems clear from the scope and pervasiveness of the phenomenon. Class actions, standing to sue, federal review of constitutional claims in state criminal and civil proceedings, attorneys' fees, the power of the federal court to fashion meaningful remedies — in these and other contexts, the Supreme Court has sharply restricted the federal courts' power to protect basic rights. Instead, protection of these rights have been relegated to the state courts, few of which have shown themselves particularly sympathetic to such interests.
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> The cases can be usefully though roughly categorized as follows:
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> 1. Those procedurally curtailing access to the federal court actions traditionally in those courts — these include the cases on standing and class actions.
> 2. Those requiring great deference to state court proceedings — these include restrictions on federal court injunctions against state enforcement and forfeiture of the right to federal habeas corpus review of constitutional defects in state court convictions.
> 3. Those denying the lower courts the power to fashion appropriate remedies for constitutional violations, including the grant of attorneys' fees, as well as other decisions cutting back on a federal court's power to redress or prevent harms by state officials.[4]

This paper deals with the attitudes of the Burger Court in school integration cases. The United States Supreme Court is a social institution which is affected by the prevailing attitudes of the people at a particular time in history. The Justices are affected by public opinion, congressional opinions, pressure by special interest groups, and by the attitude of the President of the United States. Over the years, many bills have been introduced in Congress to curb the powers of the Court or to impeach a particular member of the Court.

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[4] *The Burger Court's Efforts to Close The Federal Courthouse To Public Interest Legislation*, A Statement of The Board of Governors Society of American Law Teachers, New York, (Oct. 10, 1976).

In addition to the pressure that Presidents may exert on the Court by molding public opinion against it, there are administrative weapons available to the President, such as the power of appointment to the Court, through which he may change the Court's direction.

The Court is under constant pressure from society to restrict its interpretation of the laws to match social attitudes held by particular groups, important public figures and other influential individuals.

On the other hand, attitudes about what is justice and attitudes toward certain issues do change over time. Justice Black, commenting on changing attitudes by members of the Court after the Court declared poll taxes unconstitutional, stated that "[w]hat constitutes equal treatment for purposes of the equal protection clause do change" and "there is no need to keep the Constitution up-to-date."[5] Bickel refers to such change as "The Web of Subjectivity" and cited two earlier cases as reminders.[6] In 1923 in *Meyer v. Nebraska*,[7] the Court struck down a statute that prohibited the teaching of a foreign language to young school age children; and in 1935 in *Pierce v. Society of Sisters*,[8] the Court struck down an Oregon law which required all school age children to attend public schools only.

Again, this paper attempts to analyze trends in the rulings of the U.S. Supreme Court in the area of school integration. It does not seek to place or label the Court as either liberal or conservative, but just to indicate trends given certain parameters. The parameters selected are: 1) recent positive decisions in school integration cases; 2) standing to sue, who may sue; 3) opportunities to bring class action suits; 4) tests of evidence used in the case (rational test, fundamental interest test, or suspect classification test which leads to "strict scrutiny"); 5) distinctions by the Court in de jure vs. de facto segregated school districts; 6) remedies accepted by the Court to correct school segregation situations; and 7) other related decisions by the Court that might indicate Court trends in school desegregation cases.

This analysis has some weaknesses and limitations. First, there is no analysis of split decisions by the Court in desegregation cases in this search for a trend. Second, there is no analysis of the quality of the remedies approved by the Court to correct segregation situations. Third, there is no analysis of cases not heard by the Court because of lack of standing; or of those cases for which the Court denied certiorari. For example, in 1974, the Court disposed of 3,847 cases of which 336 were on merit, 177 were per curiam decisions, 159 were by written opinion, and 3,508 were denied review.[9] However, I feel that we do have enough information from those cases ruled on by the Court to make a trend estimate on a continuum from liberal to conservative orientation in the area of school desegregation.

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[5] South Carolina v. Katzenbach, 383 U. S. 301 (1966).

[6] A. M. Bickel, The Supreme Court and the Idea of Progress (New York: Harper and Row, 1970).

[7] 262 U. S. 390 (1923).

[8] 268 U. S. 510 (1935).

POSITIVE ACTION

In the past two or three years, the Burger Court has rendered several positive decisions for plaintiffs seeking relief from segregated school districts. In *Brinkman v. Gilligan,*[10] the Court, in line with *Swann,*[11] upheld a district court requirement that the black-white student ratio should be within 15% of the school district's average for each race. School desegregation plans for Jefferson County, Kentucky[12] and Omaha, Nebraska[13] were also upheld. The Court permitted the integration of an all girl's school by overruling a lower court decision in *Riley v. Adirondac Southern School for Girls.*[14]

In a related case, the Court, in *Aspira v. Board of Education, City of New York,*[15] ruled that the city schools must provide Hispanic students with bilingual education. The Court ruled in *Brumfield v. Dodd,*[16] that the admission of one black student to a private school in Louisiana did not qualify the school for state aid. In the selection of school board members, the Court in *Parnell v. Rapides School Board*[17] upheld the one-man one-vote district for blacks. Perhaps the most important case upheld by the Court involved a metropolitan school integration plan for the Wilmington, Delaware area.[18] The Court, in a 4-3 vote, ruled that the Wilmington case met the standards for a metropolitan remedy set down in *Milliken v. Bradley.*[19]

STANDING TO SUE

The Burger Court has stiffened its standing requirements. Unlike the Warren Court, plaintiffs must now demonstrate the article III requirement of "injury in fact." Further, the Burger Court has narrowed its interpretation of rules limiting the assertion of another individual's rights; and has demanded proof from plaintiffs that the laws they were relying upon were designed to protect them.[20] In essence, the Burger Court has made it more difficult for plaintiffs to bring discrimination suits in federal courts. The following are some examples of this trend.

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[9] P. M. Bator, The Federal Courts and The Federal System, 1977 Supplement 34 (Mineola, N. Y.: The Foundation Press, 1977).

[10] 539 F.2d 1084 (6th Cir. 1976).

[11] Swann v. Charlotte - Mecklenburg Bd. of Educ., 402 U. S. 1. (1971).

[12] Cunningham v. Grayson, 541 F.2d 538 (6th Cir. 1978).

[13] United States v. School Dist. of Omaha, 541 F.2d 708 (8th Cir. 1976).

[14] 541 F.2d 1124 (5th Cir. 1976).

[15] 423 F. Supp. 647 (S.D. N.Y. 1976).

[16] 425 F. Supp. 528 (D. La. 1976).

[17] 425 F. Supp. 399 (D. La. 1976).

[18] Evans v. Buchanan, 393 F. Supp. 428 (D. Del. 1975); Delaware State Bd. of Educ. v. Evans, Civ. No. 77-131 (1977).

[19] 418 U. S. 717 (1974).

The Court's reluctance to find "injury in fact" and grant plaintiffs standing to sue may be shown by three recent cases: *Warth v. Seldin,*[21] *Simon v. Eastern Kentucky Welfare Rights Organization,*[22] and *Spangler v. Pasadena City Board of Education.*[23] In *Warth,* low to moderate income minority group members, who lived in Rochester, New York but worked in the suburb of Penfield, charged that Penfield's exclusionary single-family and low-density zoning ordinances were discriminatory. The Court, in a 5-4 decision, denied them standing because they could not demonstrate "injury in fact." The Court indicated that its standing requirement could have been satisfied only if a developer of a moderate income housing project had applied for permission to build and had been refused. The trial never took place. In *Simon,* the Court denied standing to low-income individuals who challenged an Internal Revenue Service ruling eliminating a requirement that non-profit hospitals serve low-income patients to the extent of their financial ability. The plaintiffs claimed that the ruling violated the Internal Revenue Code and encouraged hospitals to deny services to low-income patients. The Court failed to see "injury in fact" because the plaintiffs could not prove that a change in I.R.S. rules would result in increased services to low-income patients. The Court reasoned that the hospitals could choose to give up their favorable tax treatment rather than provide increased services to low-income patients. In *Spangler,* a school desegregation case involving the Pasadena public schools, parents opposed to Pasadena's desegregation order were not allowed to intervene in the case formally because they were not a part of the original suit and, therefore, lacked standing. In comparison, a California court allowed a group of parents who were opposed to school integration in the Los Angeles City Schools to intervene in the case.[24]

In the area of prudential standing, two decisions by the Burger Court provide good examples. In *Warth,* taxpayers of Rochester were denied standing to bring a suit against suburban Penfield on behalf of individuals

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20. Society of American Law Teachers, *supra* note 4.
21. 422 U. S. 490 (1975).
22. 96 S. Ct. 1917 (1975).
23. 553 F. 2d 992 (5th Cir. 1977).
24. Bustop v. Superior Court of the State of Cal. for the County of Los Angeles, 137 Cal. Rptr. 793 (Cal. App. 1977).

who were unable to find housing in Penfield. Middle and upper-income individuals could not assert the rights of low-income individuals. However, in *Singleton v. Wulff*,[25] the Court granted standing to doctors to challenge a state law denying medicaid benefits to patients who underwent certain abortions. Doctors were allowed to sue on behalf of their patients asserting the rights of others.

On the case or controversy question, the Burger Court in *Rizzo v. Goode*,[26] a case involving claims of continued mistreatment of minority group members by the Philadelphia Police Department, the Court expressed serious doubts that the case satisfied the article III case or controversy requirement. It is expected that similar cases brought before the Court in the future will be denied standing.

Closely related to standing to sue is the concept of mootness. In the *DeFunis*[27] case, which challenged the University of Washington's Law School admission policy, the Court ruled the case was moot because it was not a class action suit and the plaintiff had already graduated. *De Funis* only asked that he be admitted. In *Jacobs v. Board of School Commissioners of Indianapolis*[28], involving students who sought to have their newspaper published, the case was ruled moot because the students had graduated. However, the Court has refused to declare school desegregation cases moot because the original plaintiffs had graduated.[29]

On a related matter, the exhaustion of state non-judicial remedies before plaintiffs in school desegregation cases can sue is generally not required by the Burger Court.[30] Such a requirement could delay school integration cases for years.

STANDING TO SUE IN CLASS ACTIONS

Class actions are given special consideration within the concept of standing to sue. In most school integration cases, class action status is a must. At the elementary and secondary school levels, few parents would get involved in a lengthy and costly legal battle in order to get one child admitted to an integrated school. Class action suits were developed in order to serve many individuals with similar claims. Although the Burger Court still permits class action suits, it has narrowed the rules for granting class action status to plaintiffs. The conditions for granting class action status are: the class must be so numerous that joinder of all members is impractical; the question of law must be common to all members of the class; the claims of the parties must be typical of the entire class; the representative parties of the class must be able to protect the interest of the class adequately; class action must be superior to other methods; and in non-civil rights class action suits, each member of the class, individually, must show a potential loss of at least $10,000.[31] The Civil Rights Act of 1871[32] does not require proof of loss in any amount, but it does require individual notice to all members of the class.

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[25] 96 S. Ct. 2871 (1976).

[26] 96 S. Ct. 598 (1976).

[27] De Funis v. Odegaard, 416 U. S. 312 (1974).

[28] 420 U. S. 128 (1975).

[29] For readings on standing to sue, *see:* Albert, *Standing to Challenge Administrative Action an Inadequate Surrogate for Claim for Relief*, 83 Yale L. J. 425 (1974); Scott, *Standing in the Supreme Court, A Functional Analysis*, 86 Harv. L. Rev. 645 (1973); Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1723-47 (1975); and Note, *Stand. to Raise Constitutional Jus Tertii*, 88 Harv. L. Rev. 423 (1974).

[30] P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System, 1977 Supplement 158-159 (Mineola, N.Y.:The Foundation Press, Inc., 1977); *see also* comment, *Exhaustion of State Administration Remedies in Section 1983 Cases*, 41 Univ. of Chi. L. Rev. 537 (1974).

Class action rules requiring notice to all members of the class and requiring that representative parties be able to protect the interest of the class in court are very important for plaintiffs who are poor. A few class action suits have been denied standing because the plaintiffs were considered too poor to substain a lengthy and costly law suit. This could make it difficult for poor people to bring suits against local school systems. The Court has also restricted the payment of attorney fees in class action suits making it difficult for poor plaintiffs to secure legal help.[33]

JUDICIAL TEST FOR EVIDENCE

Up to this point, techniques for getting the Court to hear a case have been discussed. Now, rules of evidence for the trial must be established. The court generally will employ either the traditional test in which the burden of proof is on those challenging a state policy; the "strict scrutiny" test in which the burden of proof is on the state; or a combination of the two. The "strict judicial scrutiny" test is employed when the court has decided that the state must show a "compelling interest" in the continuation of a policy and when a "suspect" classification, such as race, is involved. Therefore, the big battle is over what test will be applied. If the "strict judicial scrutiny" test is applied, the state will nearly always lose; and if the traditional test is applied, the plaintiffs will nearly always lose.

The importance of the judicial test applied in a case is clearly stated by Justice Marshall in a suit challenging the mandatory retirement age for Massachusetts state policemen.[34]

The court, in *Murgia*, reaffirmed its requirement stated in *Rodriguez*[35] that there is strict scrutiny of a legislative classification only when the classification interferes with the exercise of a "fundamental" right or operates to the disadvantage of a particular "suspect" class. Justice Marshall, in his dissenting opinion in *Murgia*, cited several cases suggesting the application of the "strict scrutiny" test and he noted that although the Court outwardly adheres to the notions of "fundamental" rights and "suspect" classes, it has apparently lost interest in their continued recognition.

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[31] Fed. R. Civ. P. 23(a) (1966). *See also* Nolte, *Standing to Sue: A Fresh Look at Class Actions*, Current Legal Issues in Education (M. A. McGhehey, ed., National Organization on Legal Problems of Education, 1977).

[32] 42 U.S.C. § 1983 (1970).

[33] Society of American Law Teachers, *supra* note 4.

[34] Murgia v. Massachusetts Bd. of Retirement, 427 U. S. 307 (1976).

[35] Rodriguez v. San Antonio Independent Sch. Dist., 411 U. S. 1 (1973).

The following cases illustrate Justice Marshall's opinion on "strict scrutiny" and the Burger Court. In *Mathews v. Lucas*,[36] the Court denied the "suspect" classification to illegitimate children. Plaintiffs challenging school board reapportionment in Louisiana were denied the strict scrutiny test for lack of both the "fundamental" right and the "suspect" classification requirements[37]. Plaintiffs in Mississippi were denied the strict scrutiny test in a case brought by the Justice Department involving a district hiring policy.[38] In school integration cases in Detroit[39] and Buffalo,[40] the strict scrutiny test was used in cases challenging school segregation within the city, but the traditional test was used in cases challenging metropolitan segregation involving the suburbs.

Departure of the Supreme Court from its traditional use of the "strict scrutiny" test in school integration cases came about when the issue changed from de jure segregation (segregation by law) to de facto segregation (segregation resulting from housing patterns). In a Denver school integration case,[41] the plaintiffs were denied the strict scrutiny test, but the Court did require a remedy for the de facto segregated Denver public schools. In a related case involving the method of financing public schools in Texas, the Burger Court shocked the educational community when it declared that education was not a "fundamental" right, nor would the Court consider low-income students as a "suspect" classification.[42] The "fundamental" interest concept is in essence the ninth amendment to the United States Constitution which states that rights enjoyed by the people, but not listed in the Constitution, cannot be taken away. However, it is up to the Court to decide what rights not listed in the Constitution are fundamental. In the Texas school finance case, the Burger Court decided that education was not a "fundamental" right. Public education did not exist at the time the Constitution was written; and, therefore, the right to an education could not be retained since it never existed. This is a very narrow interpretation of the ninth amendment.

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[36] 427 U. S. 495 (1976).

[37] Panoir v. Iberville Parish Sch. Bd., 536 F.2d 101 (5th Cir. 1976).

[38] U. S. v. Corinth Mun. Separate Sch. Dist., 414 F. Supp. 1336 (N.D. Miss. 1976).

[39] Milliken v. Bradley, 411 F. Supp. 937 (E.D. Mich. 1975).

[40] Arthur v. Nyquist, 415 F. Supp. 904 (W. D. N.Y. 1976).

[41] Keyes v. School Dist. No. I, Denver, Colo., 413 U. S. 189 (1973).

[42] Rodriguez v. San Antonio Independent Sch. Dist., 41 U. S. 1 (1973).

In more recent rulings since *Keyes v. School District No. 1,* the Burger Court has moved away from its recognition of the fact that a remedy for de facto segregated schools is needed. In two cases involving school districts in California[43] and Texas,[44] the Court recognized that the schools were de facto segregated, but ruled that they could remain segregated because there was no intent to segregate by school officials. The door was thereby opened for de facto segregated school districts to remain segregated.

DE JURE—DE FACTO—INTENT

The Burger Court, in *Keyes*, makes a clear distinction between de jure and de facto racially segregated public schools and in later decisions, it has expressed a desire to allow de facto segregated schools to remain segregated if plaintiffs in such cases cannot prove intent on the part of school officials. However, this view is not shared by everyone. For example, in California where education is a fundamental right under the California Constitution, the California Supreme Court adopted the minority view of Justice Powell in *Keyes*, which makes no distinction between de jure and de facto segregation.[45] The California Supreme Court listed two reasons for its abolition of the de jure/de facto distinction: 1) harm to all students and society, in general, occurs regardless of whether segregation is de jure or de facto; and 2) practical problems inherent in the de jure/de facto distinction. The California court felt that judicial application of such a distinction would be unending; it would place a heavy burden on representatives of minorities; and it would delay school integration for years to come. By eliminating the distinction between de jure and de facto segregation, the California court does not have to consider the question of intent to segregate.

REMEDIES

The requirements placed upon school districts by the Burger Court to remedy conditions of racial segregation are perhaps the weakest link in the school integration process. In many instances, the Court has allowed the defendant school officials to fashion their own school integration plans.[46] Generally, remedies selected by local boards have resulted in continued segregation of the schools. Illustrative of this point is the remedy approved for the Buffalo, New York public schools.[47] The Buffalo plan called for a series of "magnet schools" which resulted in white and black students remaining in their respective neighborhood schools, although a few black students did elect to transfer to schools in white neighborhoods. Similar situations exist in the Detroit and Houston public schools.

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[43] Diaz v. San Jose Unified Sch. Dist., 412 F. Supp. 310 (M. D. Cal. 1976).

[44] Tasby v. Estes, 412 F. Supp. 1185 (N.D. Texas 1975).

[45] Crawford v. Board of Educ. of The City of Los Angeles, 130 Cal. Rptr. 724 (1976).

[46] United States v. Hale County Bd. of Educ., 423 F. Supp. 275 (D. Ala. 1977); Dawson v. Troxel, 561 F.2d 694 (9th Cir. 1977); Stout v. Jefferson County Bd. of Educ., 537 F.2d 800 (5th Cir. 1976); and Arthur v. Nyquist 415 F. Supp. 904 (W. D. N.Y. 1976).

As stated earlier, in several cases, the Court recommended no remedies for de facto segregated school districts if no intent to segregate by school officials was found. Generally, metropolitan remedies have not been approved; and, in an unexpected decision in a Pasadena, California case, the Court made it possible for school districts, once integrated and later segregated because of shifts in population, to remain segregated.[48]

RELATED CASES

The Burger Court, in *Washington v. Davis*,[49] upheld the constitutionality of a test for employment in the District of Columbia's Police Department even though it disproportionately eliminated racial minorities. In a Tate County, Mississippi school district, the Court upheld ability grouping that segregated black and white pupils into separate classrooms.[50] However, in another case, the Court struck down a Mississippi school board's rule against hiring parents with illegitimate children as teacher aides.[51] The Court did not see any relationship between being a parent of an illegitimate child and the educational objectives of the schools.

In a recent case involving segregated housing, the Court declared that it was not unconstitutional for a nearly all-white suburb of Chicago to refuse to change its zoning laws to permit housing for people of low and moderate incomes; even if one of the motivations for such zoning ordinances was racial discrimination.[52] In another case, the Court denied standing to plaintiffs who challenged the allocation of federal sewer and recreation grants to a New York City suburb. The minority plaintiffs contended that the town did not spend the funds in a nondiscriminatory manner. The Court denied standing because the minority plaintiffs did not live in the town.[53]

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[47] Arthur v. Nyquist, 415 F. Supp. 904 (W.D. N.Y. 1976).

[48] Spangler v. Pasadena City Bd. of Educ., 44 U.S.L.W. 5114 (U.S. June 28, 1976).

[49] 44 U.S.L.W. 4789 (U.S. June 7, 1976).

[50] McNeal v. Tate Sch. Dist., 508 F.2d 1017 (5th Cir. 1975).

[51] Drew Municipal Separate Sch. Dist. v. Andrews, 44 U.S.L.W. 4627 (U.S. May 3, 1976).

[52] New York Times, Jan. 25, 1977, at 23.

[53] *Id.*

SUMMARY

At the beginning of this paper, I stated that I would look for a liberal/conservative trend in the Burger Court as reflected by: recent decisions in school integration cases; standing to sue; standing to sue via class actions; tests of evidence; distinctions between de jure and de facto segregation; remedies for school desegregation; and other related decisions of the Court. Given these seven parameters discussed in the paper, I conclude that the Burger Court has adopted a decidely conservative posture in the area of school integration. First, recent discussions in school integration cases generally have not been positive; and the few positive ones have been the result of split decisions by the Court. Second, standing to sue has been limited by the Court. Interested parties are consistently denied opportunities to assert the rights of others. Therefore, only the poor may assert the rights of the poor; and at the same time, the poor, at least in class action suits, are occasionally denied standing because they are too poor to defend the class. Further, minorities are denied standing to sue all-white suburbs for entry and services because they are not residents of those communities. Racially motivated policies are keeping minorities out of some suburban communities and the minorities cannot challenge the policies unless they are residents of those communities. Third, the Burger Court has increasingly refused to grant plaintiffs challenging segregated schooling the "fundamental rights" or "suspect" classification which leads to use of the strict scrutiny test of evidence. Failure to use the strict scrutiny test nearly always results in defeat for the plaintiffs and the continuation of segregation in the schools. Fourth, the Court's insistence in making a distinction between de jure and de facto segregation has resulted in segregated school districts remaining segregated if de facto segregation was found to exist without intent to segregate by school officials. Further, if de jure segregated schools became integrated and then became segregated again because of de facto segregation, they could remain segregated forever. Fifth, the remedies accepted by the Court are found more and more to be those that still leave the schools with little increased racial mix of students and staff and place most of the burden for the small amount of integration on minority pupils. School districts usually employ programs such as the "magnet" schools or the "innovative" schools concept designed to lure a few minority pupils to schools in white neighborhoods, but never lure white pupils to schools in minority neighborhoods. It seems clear that in the area of school integration, the Burger Court has taken a definite turn in a conservative direction.

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Can Affirmative Action Plans be Justified under the Compelling Interest Clause of the Fourteenth Amendment?

J. John Harris, III
Associate Professor of School Administration
Indiana University
Bloomington/Indianapolis, Indiana

INTRODUCTION

In recent years concern for the rights of minorities in the United States has brought about a renovative concept known as affirmative action. Affirmative action proposes that a minimum quantity of a particular benefit may, or must, be awarded to an identifiable racial or sexual group.[1] The purpose of such a policy is to make amends for inequities or to right wrongs, but in situations where the benefits are fewer than the people who want them, it has the effect of excluding those persons who do not belong to the newly favored group. To those excluded, "affirmative action" is interpreted as "reverse discrimination."[2]

Ironically, governmental efforts to require affirmative action policies in schools have increasingly come under attack in the courts as a violation of the equal protection clause of the fourteenth amendment. The holdings of the courts in these matters will determine the course of civil rights policy for years to come.

The purpose of this paper is to discuss whether affirmative action plans for public schools and institutions of higher education can be justified under the compelling interest clause of the fourteenth amendment to the United States Constitution. In order to do this, the paper is divided into

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1. Gillers, *Affirmative Action: The Dilemma Of Making Amends*, 223 The Nation, Dec. 25, 1976, at 691.
2. *Id.*

five parts. Part one provides an historical as well as legal chronology of affirmative action within the United States. Part two takes an analytical look at affirmative action in the societal setting. The third part examines this contemporary issue in light of discrimination within the schools. The next part discusses contemporary educational implications of affirmative action; and part five provides summary recommendations.

It is instructive to point out that affirmative action is not a recent phenomenon as many would like to believe, but it is evident in the historical as well as the legal setting of this nation.

A HISTORICAL-LEGAL FRAMEWORK

Section 1 of article XIV of the United States Constitution states:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Special note should be taken of the fact that it is action by the state which is forbidden. It is on this understanding that the course for the elimination of discrimination in all forms within the United States now turns.

Congress attempted to pass a far-reaching public accommodations act in 1875 which guaranteed to blacks the use of all public facilities. It was invalidated by the Supreme Court of the United States as violative of that section of article XIV which forbids any state from denying to its citizens the equal protection of the laws. As the section covered only "state action," it could not be used to outlaw private discrimination.[3] The way was now paved for the introduction of the "Jim Crow" practices which characterized America's views on minority civil rights until 1954.

One early reference to affirmative action may be found in the dissenting opinion of Justice Harlan in the *Civil Rights Cases* of 1883:[4] "The wartime Amendments created an affirmative duty that the States eradicate all relics, 'badges and indicia of slavery,' lest Negroes as a race slide back into 'second-class' citizenship."[5] Justice Harlan's call for affirmative action by the states would have to wait more than 80 years to be realized.

On May 17, 1954, the United States Supreme Court handed down its famous ruling on de jure segregation in the case of *Brown v. Board of Education.*[6] The ruling held that the doctrine of "separate but equal" had no place in the field of education and denies equal protection of the laws as guaranteed by the fourteenth amendment. To allow all interested parties to submit briefs before decrees granting appropriate relief were issued, an appropriate time interval was ordered. Finally, in 1955, the Supreme Court rendered its decision.[7] Lower courts were ordered to formulate remedies "with all deliberate speed" to eliminate de jure segregation of the schools.

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[3] Levine, *Racism And The Constitution: 200 Years of Inequality*, 105 Intellect, July, 1976, at 24.

[4] Civil Rights Cases, 109 U.S. 3 (1883).

[5] *Id.* at 26.

[6] Brown v. Board of Education of Topeka, Kansas, 347 U.S. 483 (1954).

Southern reaction to the order was predictable. The feelings were probably most accurately summed up by the "Declaration of Constitutional Principles" (known as the "Southern Manifesto") read into the *Congressional Record* by Southern Congressmen and Senators.[8] The Supreme Court was accused of substituting naked power for established law, and of planting hatred and suspicion where once stood friendship and understanding between the races. The Court was even accused of violating its own prior decisions. Progress on desegregation was slow at best. Finally, the United States Congress passed the Civil Rights Act of 1964 to eliminate all vestiges of discrimination. The Department of Health, Education, and Welfare issued guidelines to schools and employers requiring that positive steps be taken in the form of affirmative action policies to insure progress toward Congress' goals and the implementation of its legislative intent. Executive Order No. 11246 requires the filing of affirmative action plans by institutions with federal contracts of $50,000 or more and 50 or more employees. Institutions with contracts of less than $10,000 are not required to file plans, but are covered by the provisions. President Johnson approved the HEW guidelines on December 3, 1964.[9]

On February 6, 1967, the United States Commissioner of Education insisted that the guidelines were "purely voluntary."[10] However, the guidelines did have the "piggyback" threat of denying federal research funds to any institution not in compliance.[11] The question of whether the acceptance of federal funds could be tied to certain conditions was not at issue. The matter had been settled in favor of the conditions long ago. The question arising was that of the principle of the separation of powers. Were the HEW guidelines constitutional?

AFFIRMATIVE ACTION: A CONTEMPORARY ANALYSIS

Affirmative action statements are meant to serve as guides, not as legal commitments, unless they are required of a contractor or ordered as a corrective measure by some federal agency or the courts.[12] Frequently, these statements are mainly policy statements of a firm or educational institution and usually demonstrate to the public a commitment to the achievement of equal opportunity; demonstrate the institution's "good faith" in the event of possible complaints or charges of discrimination; facilitate the protection of individual rights; specify actions to be carried out to meet the letter and spirit of the law; and serve to protect both employers and employees from unconscious and unintentional discriminatory practices.[13]

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[7] Brown v. Board of Education of Topeka, Kansas, 349 U.S. 294 (1955).

[8] *Cong. Rec.* 4515-4516 (1956).

[9] Lawrence, *What Is The Law Of The Land On Racial Imbalance?*, 66 U.S. News and World Report, Feb. 10, 1969, at 95-96.

[10] *Id.* at 95.

[11] Loftus, *Follies of Affirmative Action*, 14 Society, Jan. 1977, at 22.

The basic problem or complaint about affirmative action statements is their controversial emphasis upon quota or percentage systems. The underlying assumption is that quotas carry the effect of reverse discrimination. J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice has argued that hiring fixed numbers or percentages of minorities, regardless of the number of applicants, assessments of the vacancies, and availability of those "better qualified," would lead to all-around lowering of standards of performance, make a mockery of the doctrine of merit as a basis for advancement, and violate the spirit of the Constitution by creating acts of discrimination against other persons solely on the basis of their race or sex. Pottinger favors the setting of goals which will serve as "objectives to be reached." To do otherwise, he insisted, would allow the concept to degenerate into a sloppy form of "affirmative action with a vengeance."[14]

Pottinger hasn't been alone in his criticism. So great was the concern over the lowering of standards that the Office of Civil Rights of the Department of Health, Education, and Welfare was forced to issue an official memorandum in December, 1974, stating that the government's requirements for affirmative action did not necessarily mean that less qualified people have to be employed.[15]

Others disagreed with Pottinger's arguments. Carlton B. Goodlett, publisher of the San Francisco *Sun Reporter*, argued that unless quantitative goals are established, there could be no reliable way to gauge progress in the elimination of racism.[16] Lawrence L. Vickery, Director of Employment Practices at General Motors, contended that the government often deals in semantics when it wants to appear not to be doing something that is not too popular while still doing it all along. Vickery also has taken exception to Pottinger's views on "goals" as substitutes for

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[12] *Affirmative Action: Effects of DeFunis Decision on Employment*, Today's Education, March, 1975, at 92.

[13] *Id.* at 91, 92.

[14] *Id.* at 91.

[15] *Id.* at 94.

[16] *Id.* at 91.

"percentages." He stated that goals and timetables for hiring are set in various affirmative action programs which employers establish in order to be in compliance with Title VII. As goals are usually in terms of percentages, many employers fail to see the difference. "It is a distinction without a difference."[17] George Jochnowitz, Assistant Professor of Linguistics at Richmond College, CCNY, favors a policy of open admissions to replace quotas to eliminate discrimination.[18]

The National Education Association's Representative Assembly has taken the initiative on affirmative action by passing resolutions regarding proportional representation for women and minorities in all phases of NEA activities. In its statement, the NEA pledged to guarantee, through its personnel policies and practices, that no person will be "employed, retained, paid, dismissed, or demoted because of race, color, national origin, religious beliefs, residence, political activities, professional association activity, age, marital status, family relationship, sex, or social orientation;[19] urge its governing boards to employ minorities and women at administrative levels; give preference in hiring, retention, and promotion to certain minority groups and women to overcome past acts of discrimination; include at least one member of a minority group in each of its appointive bodies as vacancies occur; and insist that all of its affiliates provide constitutional guarantees for proportional minority membership in all phases of governance.[20]

Resentment toward affirmative action regulations usually arises from HEW's threat of withdrawal of federal funds for non-compliance. The Carnegie Council recently recommended that a series of "graduated sanctions" might serve better than the "atomic bomb" penalty of cancellation.[21]

Arguments for the continuation of affirmative action programs are based upon two implicit assumptions: 1) that without affirmative action, the interests of minority groups cannot be properly served; and 2) that minorities as a class, or race, have a right to "just compensation" for past wrongs. Carl Cohen, Professor of Philosophy at The University of Michigan, and member of the National Board of Directors for the American Civil Liberties Union, has analyzed both arguments. The first argument assumes that if minority members are given professional training in proportion to their numbers, they will devote themselves to ethnically exclusive practices. This expectation exerts unfair pressure on minority professionals and assumes that minorities can only get professional help from members of their own minority group. The argument is fairly weak on the surface.[22]

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[17] *Id.* at 94.
[18] *Id.* at 90, 91.
[19] *Id.* at 90.
[20] *Id.*
[21] Loftus, *supra* note 11, at 24.

The second argument of compensation being owed to any particular group for past wrongs is also difficult to support legally. In law, compensation is only justified as a response to specific wrongs done to specific persons. The perception of the degree of wrong also varies from one person to another. In spite of past injustices, all citizens now enjoy constitutional rights without regard to race. According to the U.S. Supreme Court, the rights created by section 1 of article XIV are "by its terms, guaranteed to the individual."[23] Hence, the argument that the Court may be induced to deny rights to persons of one race in favor of another race is invalid. Equal protection is not achieved through the "indiscriminate imposition of inequalities."[24]

Economist Thomas Sowell analyzed affirmative action programs in higher education using two surveys of academies conducted by the American Council of Education in 1968-69 and 1972-73. Sowell's study was undertaken in an attempt to find out how much discrimination existed before the implementation of affirmative action goals and timetables; and how much good these regulations have accomplished? Sowell found that almost all progress in the field of eliminating discrimination had been achieved prior to 1969 and little change has occurred since 1970. The progress was attributed to a decade of civil rights legislation and changes in American opinion, rather than government-imposed affirmative action programs.[25]

THE IMMEDIATE CONCERN

It has long been realized by the courts that judges cannot be expected to be experts in all matters relating to educational administrative decisions. Realizing that they must often rely on expert outside opinion, the courts gave "great weight" to the HEW guidelines.[26] They said that the guidelines were substantially the same as those of the courts and were within the requirements of the United States Constitution.[27]

Many court decisions have upheld the constitutionality of affirmative action in de jure desegregation cases. In *Cooper v. Aaron*,[28] it was held that the state had a duty to take whatever corrective action was necessary to undo the harm that was created and fostered. In *Bradley v. School*

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[22] Cohen, *DeFunis Case: Race And The Constitution*, The Nation, Feb. 8, 1975, at 142.
[23] Shelly v. Kraemer, 334 U.S. 1 (1948).
[24] Cohen, *supra* note 22, at 143.
[25] Loftus, *supra* note 11, at 23.
[26] Singleton v. Jackson Municipal Separate Sch. Dist., 348 F.2d 729 (5th Cir. 1965).
[27] United States v. Jefferson County Bd. of Educ., 380 F.2d 385 (5th Cir. 1967).
[28] 358 U.S. 1 (1958).

Board of the City of Richmond,[29] it was held that the initiative in achieving desegregation must come from the school authorities. The court held that affirmative action meant more than simply telling people that they now have a choice. Since the year of the decision, 1965, the court held further that it was "high time" that the court insists on good faith compliance which requires administrators to proceed actively to undo the segregation. Finally, in *Rogers v. Paul*,[30] the Supreme Court held that Negro students were entitled to immediate relief.

In *United States v. Jefferson County Board of Education*,[31] the court stated that the two *Brown* decisions had compelled the seventeen states which had segregated their public schools to take affirmative action to reorganize their schools into unitary, non-racial systems. The defendants argued that the HEW guidelines of Title VI require integration in violation of the intent of the Civil Rights Act of 1964 which only required desegregation. The court found this argument invalid and stated that in three other cases — *Aaron v. Cooper*,[32] *Rogers v. Paul*,[33] and *Bradley v. School Board of the City of Richmond*[34] — the states of the 5th Circuit had been compelled to take affirmative action to reorganize their school systems by integration in all phases of instruction. A study of the HEW guidelines showed that the HEW standards are within the rationale of *Brown* and the congressional objectives of the Act.

In the matter of faculty, the court held that the school authorities had an affirmative duty to break up the historical patterns of segregated faculties. The court required that school authorities had to report on their progress, and that they had the burden of justifying any lack of progress.

On rehearing the *Jefferson County* case en banc, the court reaffirmed the previous decision.[35] In addition, the following findings were made: school boards and officials have an "affirmative duty" to bring about an integrated, unitary school system by requiring integration of facilities and activities, as well as students and faculties; freedom of choice plans have to be effective, and a child has no "inalienable right" to choose his school; percentages in HEW policy statements are only "rough rules of thumb" for measuring how effective "freedom of choice" plans are and plans "longer on promises than performance" should be abandoned and another tool tried; and the HEW guidelines comply with the letter and spirit of the Civil Rights Act of 1964 and with the requirements of the United States Constitution.

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[29] 345 F.2d 310 (4th Cir. 1965).

[30] 382 U.S. 198 (1965).

[31] 372 F.2d 836 (5th Cir. 1966).

[32] 358 U.S. 1 (1958).

[33] 382 U.S. 198 (1965).

[34] 345 F.2d 310 (4th Cir. 1965).

[35] United States v. Jefferson County Bd. of Educ., 380 F.2d 385 (5th Cir. 1967), *cert. denied*, 389 U.S. 840 (1967).

Again, in *Green v. County School Board*,[36] the U.S. Supreme Court held that the school board bears the burden of coming forward with a plan which realistically promises to work *now*. Finally, in *Swann v. Charlotte-Mecklenburg Board of Education*,[37] the Supreme Court held that if school authorities fail in their affirmative obligations, judicial authority would be invoked and if a school board presents the court with a "loaded game board" of racially neutral assignment plans, affirmative action in remedially altering attendance zones is proper.

Affirmative action is inextricably tied into many legislative acts that Congress has passed since 1964. Titles IV, VI, and VII of the Civil Rights Act of 1964[38] forbid discrimination on the basis of race, color, and national origin in instructional institutions which receive federal financial assistance. They prohibit discrimination in student admissions, access to programs, student policies, provisions for bilingual instructional programs, and in employment practices. In 1972, Title IX of the Education Amendments of 1972 was passed to prohibit sex discrimination in all federally assisted education programs.[39] The enactment of the Family Education Rights and Privacy Act of 1974 (also known as the Buckley Amendment) was designed to deny federal funds administered by the Office of Education to any educational institution unless the institution extends to students over 18 (or their parents, if the student is under 18) the right to inspect data files related to him.[40] The legality of the HEW guidelines in all areas covered by these legislative acts, outside of the area of de jure segregation, has come under increasing attack on the grounds of constitutionality and appropriateness in light of recent court decisions.

In the area of de facto segregation, the holdings of the courts are not encouraging. In evaluating a claim that a state action violates the equal protection clause, the following three criteria must be considered: 1) the character of the classification in question; 2) the individual interests affected by the classification; and 3) the governmental interests asserted in support of the classification.[41] For example, in *Deal v. Cincinnati Board of Education*,[42] the court pointed out that the *Brown* decision did not allow a state to classify its citizens differently because of their race and if a state or its agencies do not adopt impermissible racial criteria in their treatment of individuals, then there is no violation of the Constitution. The showing of harm or detrimental impact is not enough. Equal opportunity, the court felt, meant that "each child begins the educational race without arbitrary official handicaps. It does not require that each child shall finish at the same time."

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[36] 391 U.S. 430 (1968).

[37] 402 U.S. 1 (1971).

[38] Civil Rights Act of 1964, 42 U.S.C. § 2000 a-d (1970).

[39] Loftus, *supra* note 11, at 22.

[40] *Id.*

[41] Dunn v. Blumstein, 405 U.S. 330 (1972).

[42] 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967).

The second round in the same case found the court of appeals affirming the original decision, adding that there was no constitutional duty for the officials to take affirmative action to correct de facto segregation.[43] Again, in *Keyes v. School District No. 1*,[44] the Court made no mention of the duty of school boards with regard to de facto segregation. Similar holdings in the 1st, 2nd, and 10th Circuits[45] indicate that affirmative action in the area of de facto segregation will have to await a final determination by the Supreme Court on the constitutionality of racial discrimination in the absence of state action.

Clues as to the eventual outcome of the matter may be taken from recent Supreme Court decisions in areas outside the field of education. In *Commonwealth v. Operating Engineers, Local 542*,[46] brought under section 1981 of the Civil Rights Act of 1866, the Court practically equated the coverage of the 1866 Act to that of Titles VI and VII of the Civil Rights Act of 1964 and paragraphs 2 and 5 of articles XIII and XIV of the Constitution concerning purely private acts of racial discrimination.[47] In *Washington v. Davis*,[48] the Court held that in Washington, D.C., the police department could not be held to have improperly discriminated on the basis of race when it adopted an affirmative action plan to recruit black officers.

The question of whether affirmative action can be ordered to correct discrimination in the curriculum has not yet been settled on constitutional grounds. In 1974, for example, the U.S. Supreme Court decided, in the case of *Lau v. Nichols*,[49] that bilingual programs, appropriate to the needs of the students, must be provided in San Francisco. However, the case was decided on the basis of the violation of Title VI of the Civil Rights Act of 1964. HEW guidelines had provided for instruction to correct language deficiencies and the school district had agreed to abide by the guidelines when it accepted the funds. A similar issue was decided on the same grounds in *Serna v. Portales Municipal Schools.*[50]

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[43] Deal v. Cincinnati Bd. of Educ., 412 F.2d 1387 (6th Cir. 1969), *cert. denied;* 402 U.S. 692 (1971).

[44] 413 U.S. 189 (1973).

[45] Downs v. Board of Educ., 336 F.2d 988 (10th Cir. 1964); Springifled Sch. Comm. v. Barksdale, 348 F.2d 261 (1st Cir. 1965); Offerman v. Nitkowski, 378 F.2d 22 (2d Cir. 1967).

[46] 392 U.S. 409 (   ).

[47] Bonpua, *Law Of 1866 And Ethnic Educator's Right To Fair Treatment*, 103 Intellect, Feb. 1975, at 331.

[48] 96 S. Ct. 2040 (1976).

[49] 414 U.S. 563 (1974).

Title IX regulations frequently are cited as an example of an excessive use of statutory power by Congress. The regulations have been referred to as a "witch's broom" with which HEW can ride into any school closet or private chamber in violation of congressional intent. HEW's insertion of the word "benefits" and the substitution of the word "institutions" for "programs" are to be noted as violative of congressional intent.[51] Arvo Van Alstyne, Vice-President of the University of Utah and Professor of its College of Law, holds the view that Title IX regulations are unconstitutional because they exceed the law-making power granted by the Constitution.[52] It is often claimed that Title IX may be justified under the fourteenth amendment. However, this argument is in error for two reasons: 1) since the fourteenth amendment is limited to state action, it cannot authorize any regulation of policy over private schools; and 2) the power to outlaw sex discrimination is limited in this case because sex does not enjoy the status of a constitutionally suspect classification. Van Alstyne has argued for a strict constitutional interpretation to avoid doubts about the Title's constitutionality. A proper interpretation would construe only those acts which have invidious qualities as violative of the equal protection clause of the fourteenth amendment. For a law to be considered unconstitutional under the equal protection clause, it must reflect a discriminatory purpose. If the law is neutral on its face, serving otherwise permissible purposes, it cannot be held unconstitutional simply because it adversely affects a larger proportion of one race (or sex) than another.

If Title IX is viewed in this manner, it cannot possibly support the mandatory compliance actions which have been undertaken by HEW through its implementation regulations. The regulations state that the effects of discrimination on the basis of sex must be eliminated without reference to any discriminatory institutional purpose. However, the standards for non-discrimination imposed are far in excess of the minimum "norms" which are mandated by the equal protection clause of the fourteenth amendment.

According to this argument, the regulations are wholly unauthorized by Title IX, as construed in the strict constitutional sense. If Title IX does authorize the regulations, then the Title itself is probably unconstitutional. "The government, in my opinion, can't have it both ways."[53]

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[50] 499 F.2d 1147 (10th Cir. 1974).

[51] Oaks, *Title IX: The Future of Independent Higher Education*, 43 Vital Speeches Of The Day, April 1, 1977, at 374.

[52] *Id.*

[53] *Id.* at 375.

Other opinions hold that the Title IX provisions are constitutional. Laughlin McDonald, writing in the *Saturday Review*, feels that since 1971, the Court has rejected the notion that sex discrimination can be tolerated as long as it is reasonable.[54] Burger Court decisions have viewed gender-based distinctions as constitutional only if they establish "important government objectives and further those objectives in substantial, not merely reasonable ways."[55] Certain rulings of the Court have found that laws granting women special compensatory treatment for past economic discrimination are constitutional. A recent amicus curiae brief filed by the National Organization for Women's Legal Defense and Education Fund argues that a "preference to aid minorities is perfectly consistent with the purpose of the Fourteenth Amendment . . . The Nation is committed to meaningful integration now . . ."[56]

The premise that affirmative action is necessary to correct past discrimination even if this means giving preference to minorities in programs until proportional representation for the minority is reached has been challenged twice in this decade. The first case challenging this premise was that of *DeFunis v. Odegaard.*[57] Marco DeFunis, a law school applicant, complained that he had been denied admission to the University of Washington Law School because the place for which he would have qualified, had been set aside for a specified number of minority applicants. DeFunis argued that his scores on the application tests were higher than those of the minority applicants, and he had been denied the equal protection of the laws and discriminated against because of his race. DeFunis argued that preference based upon race or national origin was precisely what the doctrine of equal protection of the laws precludes.[58]

In March, 1973, the Supreme Court of the State of Washington ruled in favor of the university. In its decision, the court concluded that its interpretation of the *Brown* decision did not warrant the conclusion that all racial classifications are per se unconstitutional. Racial classifications are unconstitutional only when they are invidious, or when they stigmatize a racial group. The court held that the preference admissions policy of the university does not meet these criteria because the purpose of the policy is not to separate, but to bring the races together.[59]

The U.S. Supreme Court had ruled on the question of non-invidious racial classifications before. In *Swann*,[60] the Court held that "as a race of students must be considered in determining whether a constitutional violation has occurred, so must race be considered in formulating a remedy." Thus, racial classification has been held constitutionally permissible. However, the Court held that racial classification must be subjected to the "most strict scrutiny."[61] Thus, the burden was clearly on the Law School to show a compelling state interest to justify racial classification. Moreover, the Supreme Court of Washington found that the elimination of racial imbalance in public legal education was a compelling state interest. It was felt that the imbalance could only be corrected by actually providing legal education for those minority groups previously denied it.[62]

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[54] McDonald, *Has The Supreme Court Abandoned The Constitution?*, 4 Saturday Review, May 28, 1977, at 14.

[55] *Id.*

[56] *Affirmative Action: Effects of DeFunis Decision on Employment*, *supra* note 12, at 89.

[57] 507 P. 2d 1169, *cert. granted*, 414 U.S. 1038, *vacated as moot*, 416 U.S. 312 (1974).

[58] Cohen, *supra* note 22, at 136.

[59] *Id.* at 137-138.

[60] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

Opponents of the Court's decision argued that regardless of the Court's interpretation, racial classifications are always invidious, stigmatizing, and unconstitutional under the fourteenth amendment. The Constitution must always be considered "color blind."[63] In addition, they argued that the U.S. Supreme Court had ruled in *Dunn v. Blumstein*[64] that when the basis for a classification is "inherently suspect" and when a fundamental constitutional right is involved, the standard for review must be "exacting." The essence of the exacting test is that the classification not have the effect of penalizing any person simply on the basis of race.[65] The penalizing of DeFunis seemed to violate this doctrine.

The *DeFunis* case was appealed to the United States Supreme Court. While the appeal was pending, Justice William O. Douglas allowed DeFunis to attend the Law School.[66] Unfortunately, as is often true with cases today, by the time the *DeFunis* case came before the Supreme Court, DeFunis had graduated and the Court declared the case "moot."[67]

The second case, and the one which shows the most promise in deciding the issue, is *Bakke v. Regents of the University of California.*[68] No danger exists of this case being declared "moot" because the plaintiff was never admitted to the school for which he made application. Alan Bakke, an applicant for medical school, had been rejected by the University of California Medical School at Davis despite high grades and test scores on the Medical College Admissions Tests (MCAT). Bakke argued in court that admission would have been granted to him if 16 of the 100 places normally available hadn't been reserved for minority students who had scored much lower than he on the admission tests. The medical school contended that this action was proper under the school's affirmative action policy. Bakke claimed violation of his constitutional rights with regard to "equal protection of the law."[69]

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[61] Loving v. Virginia, 388 U.S. 1 (1967).

[62] Cohen, *supra* note 22, at 138.

[63] *Id.* at 139.

[64] 405 U.S. 338 (1972).

[65] Cohen, *supra* note 22, at 141.

[66] *Affirmative Action: Effects of The DeFunis Decision on Employment, supra* note 12, at 89.

[67] Gillers, *supra* note 1.

[68] 553 P. 2d 1152 (Cal. 1976), *cert. granted*, 97 S. Ct. 1098 (1977) (No. 76-811).

In September, 1976, the California Supreme Court ruled in favor of Bakke. The court reasoned that if discrimination is wrong, it is wrong no matter who suffers from it. Despite that university's long history of denial of access and privilege to minority groups, the affirmative action policy of the school was nonetheless ruled unconstitutional. The school might have been justified in setting aside 16 places for disadvantaged students (open to all applicants), but not in limiting those places to disadvantaged minority students only.[70]

The California Supreme Court denied a petition for rehearing by the university on October 28, 1976. The Regents of the University of California at Davis consequently decided to appeal the case to the United States Supreme Court. A petition of certiorari was filed on December 14, 1976, and certiorari was granted on February 22, 1977.[71] Hearings on the case began with the opening of the October, 1977 Supreme Court term.[72]

The university claims that the implementation of the Task Force program of preferential admissions was the only possible approach for redressing the historic practice of limiting the opportunities for minorities to enter the professional schools. In addition, it is argued that the standard of strict judicial scrutiny does not apply to this case because it is only applicable to instances of racial classification aimed at harming minorities. To apply the same standards to a program intended to *aid* such groups would "stand the Equal Protection Clause on its head," and would lead to an unwarranted degree of judicial intervention in matters properly reserved to the states and to educators.

Moreover, the university points out that most professional schools in the country use special admissions programs. Any attempts by courts to force them to engage in subterfuge and hypocrisy would result in debilitating consequences relative to affirmative action efforts; and most schools would be forced to shut down their special-admissions programs. They claim that they are attempting only to address the facets of a larger problem of society which falls within their "appointed role."

The adoption of the Task Force program is said to follow the formal recommendations of the Association of American Medical Colleges, and has the approval of the AMA, the NMA, and the American Hospital

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[69] Gillers, *supra* note 1.

[70] *Id.* at 692.

[71] Bakke v. Regents of Univ. of Cal., 553 P. 2d 1152 (Cal. 1976), *cert. granted*, 97 S. Ct. 1098 (1977) (No. 76-811).

[72] *Id.* 46 U.S.L.W. 3249 (Oct. 18, 1977) (No. 76-811).

Association. It is pointed out that law schools and the executive branch of the federal government have voluntarily adopted similar racially-conscious means to counter discrimination.

In addition, it is asserted that the Davis school does not view its program as a "quota" system — but rather as a goal. The term "quota" may be interpreted as a ceiling or floor. This is in error. There exists no floor in the program below which minority presence is not allowed to fall. No unqualified applicants are ever admitted to insure that each class contains a certain number of minorities. In years in which 16 qualified minority students are not found for the program, the goal will simply not be met.

The university claims that a basic flaw also exists in the argument that the students with the highest numerical indicators on the MCAT will have the highest performance as medical students. The research data pertaining to graduate school admission requirements in many professional disciplines, *e.g.*, law, medicine, education, psychology, is inconclusive as it relates to performance in graduate schools. Indeed, the argument that a student has a "right" to admission to a program in preference to another student because of his higher test scores is also false. No such "right" exists. Among the "pool of the qualified," faculty judgments are held to carry more weight than formal credentials.

The university argues that Bakke's claim that the action of the school resulted in injury through "displacement" is inaccurate because the "injury" is, in reality, only a diminished opportunity to obtain a benefit which he had not previously enjoyed. No denial of an achieved position has occurred, nor can he show clear entitlement to an advancement which was denied to him through the action of the Task Force program. In conclusion, the university contended that if the Court affirms Bakke, it would only serve to contribute to a continued subordination of racial minorities.

The California Legislature's Permanent Subcommittee on Post-secondary Education has prepared a draft on the *Bakke* decision in which the topic of disadvantaged graduate students is discussed. The report pointed out that research findings are mixed on test scores' ability to predict performance in graduate/professional schools after the first year. The report recognizes that, to many members of the majority culture, a policy of preferential admissions will always seem unfair. Ninety percent of the specially-admitted minority students eventually become practicing physicians, indicating that they are capable of gaining admission to the profession on the basis of their ability. However, the report holds little hope for suggested alternatives. Especially noteworthy in this respect is a Berkeley Law School response to *Bakke* which stated that a redesigned admissions program with emphasis on economic disadvantagement rather than racial criteria would fail because many minority students are middle class, economically and educationally, and are not monetarily deprived;

and income-based special-admissions programs would only serve to increase the number of white competing against poor minorities.

However, the handling of the case before the California Supreme Court did result in one legally interesting turn of events which might have a bearing on the final outcome of the case. The University of California's counsel presented no evidence that there had ever existed any hint of past overt discrimination at the school to justify the creation of the special program. It is common legal knowledge that where past discrimination can be proved, the courts have upheld special programs for minorities and women.[73]

In another vein, a key to the U.S. Supreme Court's holding may come from its ruling in the case of *International Brotherhood of Teamsters v. United States.*[74] In that case, the U.S. Supreme Court held that in the absence of discrimination, work forces would be expected to be more or less representative of the community from which the workers were hired. This would seem to suggest that the setting of numerical requirements may indeed be justified.[75]

CONTEMPORARY EDUCATION IMPLICATIONS

In retrospect, affirmative action programs have been upheld in the courts on the grounds that they are in agreement with the various Civil Rights Acts and HEW guidelines formulated to implement those Acts. To date, the only real fourteenth amendment basis for affirmative action is in the area of de jure segregation. It is now well established that in de jure segregation cases, the courts have found the HEW guidelines to be in agreement with the fourteenth amendment. The courts have ruled that school boards do have affirmative duties to see that all vestiges of state-created segregation are ended.

Affirmative action finds its best argument for support in the fact that the federal government may attach whatever strings it wishes to the funds and contracts that it awards. This has proven to be a more effective wedge in opening the door to end discrimination in the past few years than any action taken by the courts. Until other forms of discrimination fall under the strict scrutiny test of the Supreme Court, or until these forms are found to be in violation of the fourteenth amendment, the continuation of affirmative action programs will have to depend upon compliance induced by the threat of withdrawal of federal funds.

Whether the *Bakke* case will be decided in favor of affirmative action to compensate for the past injustices to minorities is still in doubt. The ruling could go either way, as evidenced by the *DeFunis* case in Washington. Opinions expressed by both sides call for basic constitutional decisions which will greatly affect the course of civil rights legislation for years to come.

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[73] Allen, *The Bakke Case and Affirmative Action*, 9 The Black Scholar, Sept. 1977, at 10.

[74] 97 S. Ct. 1843 (1977).

[75] The United States Commission on Civil Rights, *Statement on Affirmative Action*, Clearinghouse Publication 54 (Oct. 1977).

Assuming that *Bakke* is upheld, what would be the consequences? Will it bring reform in the training of minority physicians? The outlook is doubtful. It has been the tendency of those in privileged and important positions to restrict access to those positions. Elitism indeed corrupts and the medical "priesthood" is among the worst in this respect.[76] It is probably naive to expect one Supreme Court decision to overcome this tendency to resist change.[77]

It may be that the court rulings have an adverse effect on the public's concern over discrimination. Ivan B. Gluckman warns us that public support for affirmative action policies seems to wane as the intensity of the reverse discrimination movement increases.[78] The public will certainly show a weakening of support for affirmative action if other more equitable remedies can be formulated.[79]

It would appear that educational institutions at all levels will have to comply with affirmative action programs as long as they continue to accept federal funds and are subject to Executive Order No. 11,246; Titles IV, VI, VII, or IX; or court-imposed requirements. Teachers will have to note the need to comply with both the letter and the spirit of these plans regardless of the continuing arguments concerning their constitutionality.

SUMMARY RECOMMENDATIONS

Today, educators find themselves faced with a wide variety of discriminatory practices. Frequently, the extent of the discrimination goes unrecognized and is defended on the grounds that "it has always been that way," or by the more insidious phrase of "business as usual." The doctrine of affirmative action was implemented by the federal government in response to indifference by the majority to the long-time deprivations suffered by minorities. It is up to today's educators to see that those we teach do not remain indifferent, but become conscious of brotherhood and aware of their legal obligations to their fellow men.

Collectively, educators can band together and formulate their own affirmative action plans for their own institutions. The plans would serve as a positive example to the public and as a check to insure that discriminatory practices are recognized and eliminated.

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[76] Margolis, *Why 117 Medical Schools Can't Be Right*, 9 Change, Oct. 1977, at 28.

[77] Stevens, *The Good News of Bakke*, 59 Phi Delta Kappan, Sept. 1977, at 26.

[78] Gluckman, *Affirmative Action: Is it Really Discrimination in Reverse?*, 6 NOLPE Law School Journal 155 (1976).

[79] *Id.* at 166.

Politically, educators can petition their representatives in Congress and their state and local legislators to pass laws and formulate affirmative action policies to eliminate discriminatory practices. Persons who are currently suffering from the consequences of discrimination can be encouraged and helped to file lawsuits individually, or on a class action basis, for relief and to test the constitutionality of various laws.

Under our system of justice, a wrong can be perpetuated indefinitely until someone arises to challenge that wrong in court. When indifference rules a nation, that is the only way in which legal discrimination can finally be ended. One becomes most concerned when thinking about relying upon support for affirmative action from society at large. It is indicated that, in many instances, history has generated despair, not hope. Lerone Bennett, the writer, illustrates this in *The Shaping of Black America:*

> A nation has a choice. It chooses itself at fateful forks in the road by turning left or right, by giving up and the taking, in the deciding and not deciding, the nation becomes. . . . For the decision once made, engraves itself into things, into institutions, nerves, muscles, tendons; and the first decision requires a second decision, . . . and it goes on and on, spiraling in an inexorable process which distorts everything and alienates everybody.[80]

Although the question of whether affirmative action can be justified under the compelling interest clause is a constitutional one, the power to operationalize this concept to its fullest extent rests with the citizenry of this nation. It is our task, as educators, to attempt to alter future public opinion before legal intervention is necessary.

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[80] Bennett, The Shaping of Black America, (Chicago: Johnson Publishing Co., 1975).

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Homosexuality, the Law, and Public Schools

Kenneth W. Brooks
Assistant Professor
University of Kentucky

Charles F. Faber
Professor and Chairman
Department of Administration and Supervision
University of Kentucky

Glenn Smith
UCEA/NLIP Intern
National Association of State Directors of Special Education
Washington, D.C.

The pliable fabric of today's society is woven of fluid threads of every imaginable sort. Conflict, confrontation, and change must occur as these threads cross. Three aspects of our society increasingly coming together with dynamic results are homosexuality, the law, and public schooling. School administrators and other educators need to understand homosexuality as a concept and as a legal issue in relation to public education.

Such an understanding is necessary as a result of two factors. First, the research on homosexuality has historically been remiss. It was typically based on institutionalized sex offenders or patients of psychiatrists.[1] Control groups were seldom utilized and samples were typically small. Little in the way of comparative studies was done, adding a culture-bound quality.[2] In recent years, some mitigation of these shortcomings has occurred, stimulated primarily by the benchmark study completed in about 1950 by Alfred C. Kinsey, a zoologist. Kinsey approached the study from a sociological perspective and examined six forms of sexuality. While homosexuality was but one of the forms studied, it created considerable discussion. Studies since 1950 have confirmed most of the Kinsey conclusions and have helped to establish a new perspective of homosexuality.[3]

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[1] Brown, *Counseling the Youthful Homosexual*, 22 Sch. Counselor 325 (1975).

[2] M. Weinberg and C. Williams, Male Homosexuals: Their Problems and Adaptations (1974).

A second major factor prompting a review of homosexuality has been an increase in court litigation regarding the rights of homosexuals. The frequency, the nature, and the outcome of litigation have changed dramatically. In the past, a limited number of cases, centering primarily on criminal charges and resulting in frequent convictions, was the rule. More recently, cases involving the civil rights of homosexuals have become common, with rulings favorable to their position occurring frequently. A number of the cases relate to education directly.

To discuss effectively the institutions of law and schooling with respect to homosexuals, it is necessary first to briefly elucidate homosexuality.

HOMOSEXUALITY: THE ISSUE

The term "homosexuality" is derived from words with the original literal meaning of "the same sex."[4] It has come to include sexual activities and social transactions between people of the same gender.[5] Homosexuality should not be thought of as an act but rather as a condition or perspective that individuals either have or do not have.[6] It is seen today not as ipso facto pathological but rather as a variation of sexual expression.[7]

Origins of Thought

The origins of writings on homosexuality can be traced rather directly to about the seventh century B.C. As part of an effort to distinguish themselves from surrounding nations, Jews first condemned homosexuality as a form of idolatry at about that time. Prior to the seventh century, homosexuality had been an accepted part of Jewish life and had been included in some forms of sexual worship.[8] Within a fifty-year period during and following the Babylonian Exile, conservative Jewish factions reformulated many beliefs and insisted upon an ascetic philosophy. This again was probably to sharpen differences from neighbors and unify the Jewish nation. In addition to homosexuality, other forms of sexual expression were also condemned. Sex was viewed as acceptable solely for procreation.[9]

This condemnation was recorded as part of Talmudic law. Eventually, Hebraic attitudes were adopted into Christian codes. These were elaborated upon by writers such as Paul, who described homosexuality as foreign, unfamiliar, unnatural, and paganistic. With the spread of Christianity came the expansion of this anti-homosexual perspective. Sexual law was rigidly enforced by the church. It became part of ecclesiastic law in England and, after 1213, enforcement was shared by church and state. The legal system in the United States was an outgrowth of English common law and the abhorrence of homosexuality was transferred intact. The three major churches in the United States have historically condemned it. Anti-homosexual bias was further strengthened in the United States as a result of the Puritan view that sex of any kind was evil, dangerous, to be repressed, not for pleasure, and only appropriate in marriage for procreation. Homosexuality was viewed as a classic sin.[10]

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[3] C. Tripp, The Homosexual Matrix (1975).

[4] Weltge, *Forward*, The Same Sex: An Appraisal of Homosexuality viii (R. Weltge ed. 1969).

[5] E. Bolmeier, Sex Litigation and the Public Schools 40 (1975).

[6] K. Plummer, Sexual Stigma: An Interactionist Account 95 (1975).

[7] B. Oliver, Jr., Sexual Deviation in American Society 122 (1967).

[8] M. Winberg and C. Williams, *supra* note 2, at 6.

[9] C. Tripp, *supra* note 3, at 5-6.

It was against this backdrop that a largely innaccurate public view of homosexuality developed. The inaccuracies were also reflected in scholarly writings of the day.

The Current Perspective

Much of the writing and study related to homosexuality has focused on its etiology. Purported causation has included failure of individuals to progress through the various developmental stages, hormonal imbalance, temperament, dramatic homosexual encounters, traumatic sexual failures, infantile fixations, parental influence, and identity problems. None of these has been documented as the cause. Today most authors accept the view that homosexuality is the result of combinational influences, particularly conditioning.[11] The determination of a mode of sexual expression is the culmination of an individual's development and no single element or influence is likely to be definitive.

The incidence of homosexuality in a society has also received considerable attention. Factors such as climate, wealth, race, developmental level, or cultural prohibition within a society seem to have little real impact on incidence. In fact, the incidence of homosexuality in society is rather constant. The actual percentage of population appropriately so labeled is difficult to assess.[12] It is clear that homosexuals represent a significant minority and that homosexuality should be viewed as part of a homosexuality-heterosexuality continuum. Few people exist at an extreme of exclusive homosexuality.

In view of this current perspective on homosexuality, it is not surprising that scholars no longer view it as an illness,[13] as was the case for decades.

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[10] W. Pomeroy, *Homosexuality*, The Same Sex: An Appraisal of Homosexuality 5-6 (R. Weltge ed. 1969).

[11] J. Steakley, The Homosexual Emancipation Movement in Germany 5 (1975).

[12] M. Baisden, Jr., The Dynamics of Homosexuality 1 (1975).

[13] C. Tripp, *supra* note 3, at 5-6.

In 1974, the American Psychiatry Association removed it from the list of mental illnesses.[14] The public's attitude is also changing, although more slowly.[15] Societal fear and misunderstanding still exists and, as a result, homosexuals experience some difficulties in their everyday lives.[16] To help deal with these difficulties, homosexuals have begun an organized movement similar to those begun in earlier times by Blacks and women.[17] While some failures are to be expected, the Gay Liberation Movement has had dramatic effects. A more accepting, rational view of homosexuals is developing.[18]

Schools as critical and visible institutions have been affected and will continue to be affected as the societal view of this minority evolves. The schools have been touched by legislative activity in this area, as exemplified by Illinois which became the first of a dozen states to decriminalize sexual activities among consenting adults in 1962. Students in public schools are, no doubt, influenced by the existence of open homosexual organizations. Probably the most dramatic effect has resulted from case law. The impact is recent, less than clearcut, and often misunderstood. The remainder of this writing reviews case law on the subject of homosexuality in the public school setting.

HOMOSEXUALITY: THE LAW AND PUBLIC SCHOOLS

Case law on homosexuals in the public schools is of recent origin. Most of the cases are concerned with the hiring, dismissal or failure to renew contracts of homosexual teachers. All of the cases reviewed below have arisen within the past ten years. A survey of four of the leading textbooks on school law published between 1927 and 1963 failed to yield a single case involving homosexual teachers, although each book cited from thirty to fifty cases of teacher dismissal.[20] One can infer from these facts that either there were no such cases or there were such cases but the authors chose not to report them. There seems little reason to believe that the six legal scholars and four publishers involved would have withheld report-

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14. R. Barr and S. Catts, *Psychiatric Opinion and Homosexuality*, 1 J. of Homosexuality 213-214 (1974/75).

15. E. Levitt and A. Klassen, Jr., *Public Attitudes Toward Homosexuality: Part of the 1970 National Survey by the Institute of Sex Research*, 1 J. of Homosexuality 29-41 (1974).

16. W. Simon and J. Cagnon, *Homosexuality: The Formulation of a Sociological Perspective*, The Same Sex: An Appraisal of Homosexuality 18 (R. Weltge ed. 1969).

17. R. Simpson, From the Closet to the Courts 5-6 (1976); L. Maddocks, *The Law and the Church vs. the Homosexual*, The Same Sex: An Appraisal of Homosexuality 116 (R. Weltge ed. 1969).

18. D. Rosen, S. Werner & B. Yates, We'll Do It Ourselves 240-244 (1974).

19. H. Trusler, Essentials of School Law (1927); N. Edwards, The Courts and the Public Schools (1940); R. Hamilton and P. Mort, The Law and Public Education (1959); M. Nolte and J. Linn, School Law for Teachers (1963).

ing such cases if they indeed existed. The view that no such cases occurred is supported by the absence of reference to homosexuals in schools in *Corpus Juris Secundum*. Furthermore, the earliest such cases reported in *American Jurisprudence 2d* are cases from the late 1960's. In addition, all of the annual Yearbooks of School Law issued from 1940 through 1967 were silent on the subject.

Why were there no cases litigated regarding the homosexuality of teachers prior to the last ten years? One possible explanation might be that no homosexuals were employed as teachers in the public schools. This is extremely unlikely. Given the frequency of homosexuality among the general population[20] and the impossibility of detecting homosexuals through physical appearance, mannerisms, or similar means,[21] it seems statistically inevitable that homosexuals have been employed as public school teachers throughout the years.

Another possible explanation for the absence of such litigation might be that no teachers were fired or forced to resign for homosexual activity prior to the 1960's. This explanation cannot be rejected with complete certainty but it, too, seems highly unlikely. Given the repugnance with which the general population views homosexuals,[22] the general view that teachers should represent models of moral standards for pupils to emulate,[23] and the difficulty of maintaining complete secrecy about homosexual activity,[24] this explanation seems quite untenable.

A third possible explanation and the one that seems most likely is that homosexuals were indeed employed as teachers in the public schools, that in some cases their homosexuality was discovered and they were fired or forced to resign, but chose not to fight their dismissal in the courts. The plausibility of this explanation is attested to by the facts that boards of education were formerly given much more autonomy in handling personnel matters than they are at present and public revelation of homosexuality would have led to disgrace and a diminished likelihood of finding employment elsewhere. With little chance of winning a court case, why should a discharged teacher make his homosexuality public knowledge and undergo the accompanying humiliation and loss of employability?

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[20] Baisden, *supra* note 12.

[21] W. Mathews, Homosexuality: An Educational Confrontation (Feb. 25, 1973) (paper presented at the American Educational Research Association Meeting) (ERIC 076 655).

[22] A California appellate court reflected this feeling as follows: "Homosexual behavior has long been contrary and abhorrent to the social mores and moral standards of the people of California as it has been since antiquity to those of many other peoples." Sarac v. State Bd. of Educ., 249 Cal. App. 3d 58, 57 Cal. Rptr. 69 (Ct. App. 1967).

[23] The view of the teacher in loco parentis, which formerly prevailed, held that teachers stand somewhat in place of parents in training the minds and the moral character of pupils. Many examples could be given from education texts exhorting teachers to be exemplars of moral conduct.

[24] By its very nature, homosexual activity must involve at least two persons. Complete secrecy is thus by definition impossible.

One of the early textbooks on school law asked whether school authorities have unlimited discretion regarding the qualifications of those they employ.[25] The source answered its own question in the affirmative and quoted an Illinois court opinion with approval:

> The board has the absolute right to decline the employ or re-employ any applicant for any reason whatever or for no reason at all. It is no infringement upon the constitutional rights of anyone for the board to decline to employ him as a teacher in the schools, and it is immaterial whether the reason for the refusal to employ him is because the applicant is married or unmarried, is of fair complexion or dark, is or is not a member of a trades union, or whether no reason is given for such refusal.[26]

The widespread adoption of teacher tenure laws[27] and the growing recognition by the courts that non-tenured teachers are entitled to due process of law[28] have reduced the "absolute rights" of school boards in this regard. Changes in the societal view toward homosexuality, as discussed in the first section of this article, have encouraged some homosexuals to bring their homosexuality out into the open and fight discrimination directed toward them.

Court Cases

An example of this development is provided by the first court case discovered on the matter of homosexuality among teachers.[29] On June 10, 1964, Donald Odorizzi, an elementary school teacher in a California school district, was arrested on criminal charges of homosexual activity. On June 11th, he delivered his written resignation as a teacher to his superiors and the district accepted it on June 13th. In July, the criminal charges against him were dismissed and in September, he sought to resume his employment in the district. Upon the district's refusal to reinstate him Odorizzi filed suit for declaratory and other relief.

His complaint asserted that his resignation was invalid because it was obtained through duress, fraud, mistake, and undue influence and was given at a time when he lacked the capacity to make a valid contract. Specifically, he declared that

> he was under such severe mental and emotional strain at the time he signed his resignation, having just completed the process of arrest, questioning by the police, booking, and release on

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[25] Trusler, *supra* note 19, at 179.

[26] People *ex rel.* Furman v. City of Chicago, 278 Ill. 318, 116 N.E. 158 (1917).

[27] Most states have adopted teacher tenure laws since World War II.

[28] Board of Regents v. Roth, 408 U.S. 564 (1972).

[29] Odorizzi v. Bloomfield Sch. Dist., 54 Cal. Rptr, 533 (Ct. App. 1966).

> bail, and having gone for forty hours without sleep, that he was incapable of rational thought or action. While he was in this condition and unable to think clearly, the superintendent of the District and the principal of his school came to his apartment. They said they were trying to help him and had his best interest at heart, that he should take their advice and immediately resign his position with the District, that there was no time to consult an attorney, that if he did not resign immediately the District would suspend and dismiss him from his position and publicize the proceedings, his "aforedescribed arrest" and cause him "to suffer extreme embarrassment and humiliation"; but that if he resigned at once the incident would not be publicized and would not jeopardize his chances of securing employment as a teacher elsewhere. He claimed that because of his faith and confidence in their representations they were able to substitute their will and judgment in place of his own and thus obtain his signature to his purported resignation.[30]

The teacher's complaint was dismissed by the trial court, but on appeal, the appellate court held that undue influence is grounds for rescission.

It is assumed that similar instances have occurred many times in the past but that teachers have acceded to resignation demands and have not fought for their positions. Thus, the *Odorizzi* case, cited above, becomes a landmark case followed by several other court cases within a very few years.

The second case also arose in California. In this case, Thomas Sarac, a public school teacher, engaged in homosexual behavior on a public beach.[31] He was convicted of criminal activity under the California Penal Code. Subsequently, his teacher's certificate was revoked by the State Board of Education. Sarac challenged the revocation of his certificate on the grounds that the board had failed to establish any connection between the homosexual conduct on the beach and his fitness for service in the public schools. The appellate court upheld the board with the following reasoning:

> Homosexual behavior . . . is clearly . . . immoral conduct within the meaning of Educational Code, section 13202. It may also constitute unprofessional conduct . . . as such conduct is not limited to classroom misconduct or misconduct with children . . . It certainly constitutes evident unfitness for service in the public school system . . . In view of appellant's statutory duty as a teacher, there is to our minds an obvious rational connection between his homosexual conduct on the beach and the consequent action of respondent in revoking his secondary teaching

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[30] *Id.* at 537-538.

[31] Sarac v. State Bd. of Educ., 57 Cal. Rptr. 69 (Ct. App. 1967).

> credential on the statutory grounds of immoral and unprofessional conduct and evident unfitness for service in the public school system of this State. Needless to say, we find no abuse of discretion by respondent in the penalty it here imposed on appellant, nor any constitutional questions whatsoever with respect to such action on its part.[32]

A third case involving homosexuality and teaching also arose in California and involved Marc Morrison, a public school teacher in that state, who had worked in the same school district for several years without encountering any complaints about either his performance as a teacher or his conduct outside the classroom.[33] Morrison became friends with a Mr. and Mrs. Fred Schneringer. Mr. Schneringer also worked as a teacher in the same public school system.

> To the Schneringers, who were involved in grave marital and financial difficulties at the time, [Morrison] gave counsel and advice. In the course of such counseling Mr. Schneringer frequently visited [Morrison's] apartment to discuss his problems. For a one-week period in April, during which [Morrison] and Mr. Schneringer experienced severe emotional stress, the two engaged in a limited, noncriminal physical relationship which [Morrison] described as being of a homosexual nature. . . .
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> Approximately one year after the April 1963 incident, Schneringer reported it to the Superintendent. . . . As a result of that report [Morrison] resigned his teaching position. . . .
>
> Some 19 months after the incident became known to the superintendent, the State Board of Education conducted a hearing concerning possible revocation of [Morrison's] life diplomas. [Morrison] there testified that he had had some undefined homosexual problem at the age of 13, but that, with the sole exception of the Schneringer incident, he had not experienced the slightest homosexual urge or inclination for more than a dozen years. . . . No evidence was presented that [he] had ever committed any act of misconduct whatsoever while teaching.
>
> The Board of Education finally revoked [his] life diplomas some three years after the Schneringer incident. The board concluded that that incident constituted immoral and unprofessional conduct, and an act involving moral turpitude, all of which warrant revocation of life diplomas under . . . the Education Code.[34]

In reaching a decision, the California Supreme Court took careful note of the fact that no criminal acts were involved. Convictions for offenses such as sodomy, oral copulation, public solicitation of lewd acts, loitering near public toilets, or exhibitionism would have resulted in the mandatory revocation of all diplomas and life certificates issued by the State Board of Education. The court noted that the Education Code draws an important distinction between different types of sexual indiscretions by teachers, dealing with such conduct in two different sections of the code. Conviction for certain sex crimes entails automatic dismissal, but other sexual misconduct results in discipline only if it is "immoral", "unprofessional", or involves "moral turpitude." The court stated that any rule that homosexual conduct was "immoral" or "unprofessional" per se would obliterate the distinction between criminal convictions and other sexual misconduct. The court concluded that the record contained no evidence to support the conclusion that Morrison's conduct indicated his unfitness to teach. Consequently, it ordered the restoration of his life diplomas.

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[32] *Id.* at 72.

[33] Morrison v. State Bd. of Educ., 461 P.2d 375 (Cal. 1969).

[34] *Id.* at 378-379.

Another case concerning the revocation of a teaching certificate arose when Brent Moser, on October 9, 1968, engaged in overt homosexual behavior while in public view in a public restroom.[35] Moser was convicted of a violation of the Penal Code of California. Under the Education Code of California, the State Board of Education rendered a written decision finding that Moser committed acts involving moral turpitude and unprofessional and immoral conduct. Therefore, Moser's teaching credentials were revoked. Moser appealed the State Board of Education action. The Superior Court of Los Angeles County, proceeding on a petition for a writ of mandate to compel the State Board of Education to rescind its action in revoking Moser's teaching credentials, entered a judgment denying such relief. Moser appealed and the case was heard by the California Court of Appeals, which affirmed the judgment below finding that Moser committed an act involving moral turpitude and an act involving unprofessional and immoral conduct. Further, the court found that the State Board had correctly revoked Moser's credentials.

A non-California case arose when Peggy Burton, a teacher in an Oregon high school, was dismissed.[36] After Burton had commenced her second year of teaching at the school, the principal learned that she was a homosexual. There was no allegation that she was derelict in her teaching duties or that she had made any homosexual advances toward any student. After she acknowledged that she was a "practicing homosexual," the school board terminated her contract pursuant to an Oregon statute which provides that a teacher may be dismissed for immorality. Burton sought relief under a civil rights statute. The United States District Court held that the state statute vesting school boards with the right to dismiss teachers for immorality without defining immorality is unconstitutionally vague because it fails to give fair warning of what conduct is prohibited and permits erratic and prejudiced exercises of authority. The judge also stated that the statute presents serious constitutional problems by not requiring a nexus between conduct and teaching performance. Burton attacked the extent of relief the district court granted for her wrongful dismissal. The Court of Appeals for the Ninth Circuit held, however, that the district court did not abuse its discretion in awarding her monetary damages rather than ordering her reinstatement as a teacher.

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[35] Moser v. State Bd. of Educ., 22 Cal. App. 3d 988, 101 Cal. Rptr. 86 (Ct. App. 1972).
[36] Burton v. Cascade Sch. Dist. Union H.S. No. 5, 353 F. Supp. 254 (D. Or. 1973).

A highly publicized case in Maryland[37] caused considerable controversy. Joseph Acanfora was a junior high school teacher who admitted his homosexuality after employment by the Montgomery County school District. He was transferred from his teaching position to administrative work. When his request to be returned to the classroom was not granted, Acanfora brought legal action under the Civil Rights Act. As his case became public knowledge, Acanfora consented to television, radio, and press interviews and appeared on a television program where he sought community acceptance of homosexuality. The court ruled that the publicity provided by the media did not disrupt the school and that his public statements were protected by the first amendment. The court did, however, rule against Acanfora on what seemed to some a rather strained point. On his application for the teaching position, he had not revealed that he had been a member of a homosexual organization while a college student. The court concluded that as Acanfora had purposely misled the school officials in order to circumvent, rather than challenge, what he considered unconstitutional employment practices, he cannot invoke the process of the court to obtain a ruling on an issue that he practiced deception to avoid.

A case of oral copulation was reported in the courts of California.[38] Frank Metcalf, a sixth grade teacher, was convicted of the criminal offense of homosexual prostitution which occurred in a doorless toilet stall in a department store restroom during school hours. He was dismissed from his teaching position on the grounds of immoral conduct and evident unfitness for service. Metcalf contended that the evidence had been obtained by police in violation of the Constitution and, therefore, was not admissible. The court held that the Constitutional protection applied to criminal convictions only and did not apply to this case involving a civil action. The court held that the school board had sufficient cause to dismiss Metcalf on grounds of immoral conduct and evident unfitness as a teacher. The court stated:

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[37] Acanfora v. Board of Educ. of Montgomery County, 491 F.2d 498 (4th Cir. 1974).

[38] Governing Bd. of Mountain View Sch. Dist. v. Metcalf, 111 Cal. Rptr. 724 (Ct. App. 1974).

> A teacher in the public school system is regarded by his pupils as an examplar whose words and conduct are apt to be emulated by his pupils. . . .
>
> . . . [I]t was the principal's professional opinion that if the incident ever became known to Metcalf's fellow teachers, his pupils or to parents of those pupils, Metcalf would have been unable to function effectively thereafter as a teacher and his exemplar image would have been destroyed.[39]

The court agreed with the opinion of the school principal and upheld the board's dismissal of the teacher.

In the same year, another somewhat similar case appeared in the California courts.[40] Marcus Calderon, a male teacher in the El Monte School District, was charged with having engaged in the act of oral copulation with another man. This is a criminal charge in California. Calderon was dismissed by the school district. After acquittal in criminal court because the charge was not proven beyond a reasonable doubt, Calderon demanded reinstatement and payment of back salary. The California Court of Appeals held that Calderon had engaged in the act of oral copulation as charged by the board, that this behavior represented immoral conduct, and that Calderon was not entitled to recover any back salary. The court pointed out that the rule of reasonable doubt does not apply to civil cases as it does in criminal cases. As the court said:

> We reasonably assume, therefore, that our Legislature properly intended by the enactment of the pertinent sections of the Education Code to permit school boards to shield children of tender years from the possible detrimental influence of teachers who commit acts described therein . . . even though they are not found guilty beyond a reasonable doubt. . . . Finally, the criminal charge between the defendant and the State was penal in nature while the case between defendant and the Board is remedial, for the protection of young children.[41]

In the most extensively appealed case reviewed here, a school district in Washington upon learning of a teacher's homosexuality, dismissed him under a state statute providing that school boards may dismiss teachers for "sufficient cause."[42] The teacher, James Gaylord, brought suit contending that, even if his homosexuality became a matter of public knowledge, he would still be able to function effectively as a teacher. The school district administrators testified that knowledge of the teacher's homosexuality, if it became public, would impair the learning atmosphere of the classroom.

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[39] *Id.* at 727.

[40] Board of Educ. of El Monte Sch. Dist. v. Calderon, 110 Cal. Rptr. 916 (Ct. App. 1974).

[41] *Id.* at 210-921.

[42] Gaylord v. Tacoma Sch. Dist. No. 10, 535 P.2d 804, (Wash. 1975) 559 P.2d 1340 (Wash. 1977), *cert. denied*, 46 U.S.L.W. 3220 (U.S. Oct. 4, 1977) (77-91).

In view of a statutory requirement that Washington state courts give the highest consideration to the judgment of qualified educators regarding conditions necessary to maintain the optimum learning atmosphere, the trial court resolved the question in favor of the school district. Gaylord appealed. The state supreme court ruled that the burden of proof is on the district and remanded the case to the trial court to answer three major questions.[43] In answer to the first question, the court found that "it is unquestioned that homosexual acts were participated in by (Gaylord), although there was no evidence of any overt act. . . ."[44] The court based its finding on the plaintiff's admission of his homosexual status as well as other evidence. Further, in resolving the importance of such an admission, the court noted the related rule that a party's written statement, when its intent is doubtful, must be interpreted in a manner that is unfavorable. In the present case, this rule of construction was found to be upheld by evidence that the teacher had been a practicing homosexual for twenty years. In addition, he actively sought out other male homosexuals and actively participated as a member of a homosexual society. Thus, the court found that the plaintiff "failed to explain what he meant by his admission of homosexuality . . . so as to avoid any adverse inference, although he had adequate opportunity at trial to do so." Evidence also indicates that the teacher was heavily involved with a homosexual friend. "It would have been a simple matter for Gaylord to have explained the physical side, if any, of this relationship, but he did not do so."[45]

In considering the second question, the court determined that homosexuality, as it is commonly understood, is considered immoral:

> Volitional choice is an essential element of morality. One who has a disease, for example, cannot be held morally responsible for his condition. Homosexuality is not a disease, however. [The teacher's] witness, a psychiatrist, testified on cross-examination that homosexuality except in a case of hormonal or congenital defect (not shown to be present here) is not inborn. Most homosexuals have a "psychological or acquired orientation." Only recently the Board of the American Psychiatric Association has stated: "homosexuality. . . by itself does not necessarily constitute a psychiatric disorder.". . .
>
> Nevertheless it is a disorder for those who wish to change their homosexuality which is acquired after birth. In the instant case plaintiff desired no change and has sought no psychiatric help because he feels comfortable with his homosexuality. He had made a voluntary choice for which he must be held morally responsible.[46]

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[43] Gaylord v. Tacoma School District No. 10, 85 Wash. 2d 348, 535 P. 2d 804 (1975).

[44] *Id.* at 559 P. 2d 1340, 1344 (Wash. 1977).

[45] *Id.* at 1344-1345.

[46] *Id.* at 1345-1346.

In answer to the third question, the court determined that the teacher's performance as a teacher was sufficiently damaged, thus providing the grounds for dismissal. While acknowledging satisfactory teaching performance for over twelve previous years, the court concluded that the present and future teaching efficiency of the plaintiff was impaired. The plaintiff argued that his homosexuality became public knowledge through disclosure by the school authorities; therefore, he could not be held accountable. However, the court said:

> It is important to remember that (the teacher's) homosexual conduct must be considered in the context of his position of teaching high school students. Such students could treat the retention of the high school teacher by the school board as indicating adult approval of his homosexuality. It would be unreasonable to assume as a matter of law a teacher's ability to perform as a teacher required to teach principles of morality . . . is not impaired and creates no danger of encouraging expression of approval and of imitation. Likewise to say that school directors must wait for prior specific overt expression of homosexual conduct before they act to prevent harm from one who chooses to remain "erotically attracted to a notable degree towards persons of his own sex and is psychologically, if not actually disposed to engage in sexual activity prompted by this attraction" is to ask the school directors to take an unacceptable risk in discharging their fiduciary responsibility of managing the affairs of the school district.[47]

The case was appealed to the Supreme Court of the United States, which denied review on October 3, 1977.[48]

The final case reviewed here is another case from California.[49] Jack Elmer Millette, an elementary school teacher for 16 years in the Long Beach schools, was charged with immoral conduct and evident unfitness for service in the public school system in 1973. The charges were that the teacher had exposed his private parts to another man and, while masturbating, solicited a homosexual act in a public restroom. The trial court held that, although the charges were true, the conduct did not constitute sufficient grounds for dismissal because it was an isolated act, there was no notoriety, and the teacher did not constitute a threat to students or fellow teachers.

The school board appealed the trial court decision to the California Court of Appeals, which reversed the trial court. The appellate court noted that the conduct of the teacher was violative of the California Penal

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[47] *Id.* at 1347.

[48] Gaylord v. Tacoma Sch. Dist. No. 10, 46 U.S.L.W. 3206 (U.S. Oct. 4, 1977) (No. 77 91).

[49] Millette v. California, 62 Cal. App. 3d 642, 133 Cal. Rptr. 275 (Ct. App. 1976).

Code. Millette could have been charged with any one of three crimes (exhibitionism, public solicitation of lewd acts, and loitering near public toilets) but he was not so charged and thus no criminal conviction resulted. The court held that the absence of a conviction was immaterial as it was the act, not the conviction thereof, that formed the basis of his dismissal and evidenced his unfitness.

The appellate court distinguished this case from *Morrison v. State Board of Education*[50] on the basis of the facts. Morrison had committed a non-criminal act in the privacy of his own home, whereas Millette had engaged in criminal conduct in a public place.

The following table is presented in order to facilitate comparison of the ten cases reviewed above. The first six columns in the table provide basic data about the cases. The next two columns (reading from left to right) indicate whether a criminal conviction occurred and whether the educational agency was upheld in dismissing the teacher or revoking the certificate to teach. The column at the extreme right identifies the grounds for any departure from the general rule that dismissal or revocation accompanies criminal conduct only.

Principles

A review of the ten cases presented in the table indicates that certain principles are beginning to emerge. The following principles should be accepted with caution in that most are the products of state court decisions and there have been no relevant decisions by the United States Supreme Court except for the refusal to grant certiorari in the *Gaylord* case:

1. Homosexual conduct resulting in conviction of a crime is likely to be viewed as a basis for dismissal under provisions for dismissing or revoking certificates for immoral conduct.

2. Isolated cases of homosexual behavior of a private, non-criminal nature may not be the basis for dismissal as immoral conduct.

3. Rules for admissibility of evidence are not as strict in a teacher dismissal case as in a criminal case.

4. Burden of proof beyond a reasonable doubt does not apply in teacher dismissal case as in criminal case.

5. Conviction of a crime is not essential; it is the conduct, not the conviction, that is important.

6. Resignations secured through harrassment or undue influence may not be valid.

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[50] 82 Cal. Rptr. 175, 461 P.zd 375 (1969).

COURT CASES INVOLVING HOMOSEXUAL TEACHERS

Case	Year	State	Court	Outcome	Rationale	Criminal Conviction	School Upheld	Explanation of Discrepancy
Odorizzi	1966	Cal.	state court of appeals	allowed to rescind resignation	resignation secured through undue influence	no	no	no discrepancy
Sarac	1967	Cal.	state court of appeals	certificate revoked	criminal conduct was immoral conduct	yes	yes	no discrepancy
Morrison	1969	Cal.	state supreme court	certificate reinstated	homosexual conduct was not of criminal nature	no	no	no discrepancy
Moser	1972	Cal.	state court of appeals	certificate revoked	criminal conduct was immoral conduct	yes	yes	no discrepancy
Burton	1973	Or.	U.S. District Court	awarded damages	statue on immorality unconstitutionally vague	no	no	no discrepancy
Acanfora	1974	Md.	U.S. Court of Appeals	dismissal upheld	teacher purposely misled school officials	no	yes	deception by teacher was grounds
Metcalf	1974	Cal.	state court of appeals	dismissal upheld	criminal prostitution is immoral conduct	yes	yes	no discrepancy
Calderon	1974	Cal.	state court of appeals	dismissal upheld	criminal oral copulation is immoral conduct	yes	yes	no discrepancy
Millette	1976	Cal.	state court of appeals	dismissal upheld	public acts constituted criminal conduct	yes	yes	no discrepancy
Gaylord	1977	Wash.	state supreme court	dismissal upheld	public knowledge of homosexuality impairs	no	yes	public knowledge of his homosexuality was sufficient cause for dismissal

7. Statutes permitting dismissal of teachers for immoral conduct may be of dubious constitutionality if immorality is not defined.

8. Public knowledge of a teacher's homosexuality may be a basis for dismissal in certain jurisdictions even when no criminal conduct is alleged.

Pupils

A review of related cases and literature has revealed no cases concerning homosexual students. Surely homosexual pupils exist and homosexual activities involving pupils occur in the public schools in spite of the lack of cited cases. The juvenile age status of the participants and the desire to prevent personal or public scandal are at least two probable reasons for this lack of cases. The fear of exposure to family, friends, and peers while still in a period of dependency probably causes juvenile homosexuals to keep their behavior covert.

HOMOSEXUALITY: MAJOR IMPLICATIONS AND DIRECTIONS FOR PUBLIC SCHOOLS

The research of the last twenty-five years on homosexuality and court cases involving homosexuals will have an impact on public schools. As a tool of society, schools may be more susceptible to such changes than most institutions. The purpose of this section is to outline a few of the major implications for the future regarding homosexuality and public schools.

The views of Society and the Rulings of Courts will continue to become more Accepting of the Rights of Homosexuals

Despite the fact that certain societal indicators such as prejudice and discrimination concerning age, religion, sex, and race still exist in the United States, the evidence in convincing that great progress is being made to rectify past social injustices. Two hundred years after this nation's conception, certain views and practices of our society, once considered both morally wrong and illegal, are becoming both socially and legally acceptable under certain circumstances. Issues such as abortion and euthanasia, while still controversial, are now being viewed by the courts in a more accepting manner. Other indications of the emancipating trends in civil rights include the abolition of slavery; the expansion of the voting franchise to include females, Blacks, and eighteen-year-olds; consumer protection legislation; the liberalization of liquor laws; the legalization of the communist party; the abolition of the military draft; and the enactment of the affirmative action section of recent civil rights legislation to prevent discrimination in politics, education, employment, and other spheres. These are a few examples of the continual liberalization of both societal views and legal actions. Two issues presently in transformation are the decriminalization of marijuana and the liberalization of many antiquated sex laws.

No area of society has been more affected by these trends than public education. During the past twenty years, the courts have outlawed racial segregation in the public schools; extended first amendment rights by a more liberal interpretation of freedom of speech and association for both teachers and pupils; declared numerous attempts to establish religion in schools unconstitutional; enhanced the free exercise of religion for teachers and pupils; placed the burden of proof on school districts wishing to regulate the dress and grooming of pupils; established guidelines limiting suspension, expulsion, and corporal punishment of pupils; enhanced the rights of pregnant teachers; protected the rights of nontenured teachers in dismissal cases; and ruled that school officials may be held liable for damages if they, in the absence of good faith, violate the basic constitutional rights of pupils.

The courts have not been alone in these efforts. Although they have usually led the way, the Congress and the Executive Branch (particularly the Office of Civil Rights and certain offices within the Department of Health, Education and Welfare) have also taken action furthering the rights of teachers and pupils. As a logical extension of the civil rights movement, equal educational opportunity now must be extended to handicapped students. This has come about through action by the courts, the Congress, and the Executive Branch. The present effort to overcome sex discrimination in education also is receiving impetus from all three branches of the federal government.

The same thing may be true of the movement to protect the rights of homosexuals. As this movement is now in its embryonic stages, only the courts have been involved. Eventually, legislation probably will be passed by Congress and orders will probably be issued by the Executive Branch improving the lot of the homosexual in the public schools.

Perhaps this view seems optimistic. The anti-gay rights crusade, led by Anita Bryant and culminating in the Dade County referendums, may appear to be a setback for individual rights. Yet, even this episode had its hopeful side effects. Many persons previously unwilling to support homosexuals or simply uninterested in their cause were stirred by the reactionary bias of Bryant. Press and television coverage appeared to be more anti-Bryant than anti-gay. It should also be noted that all movements have temporary setbacks. The failure of the Supreme Court to grant relief to Gaylord is another setback but it was more of a failure to advance than a retreat.

In regard to liberalizing present sex laws, the courts and legislatures are presently considering the repeal and/or modification of laws concerning many practices between consenting adults. Homosexuality is one such practice. The societal view concerning homosexuality has truly advanced from a "condition" considered immoral and repugnant by church authorities to one considered a mental illness by many medical authorities to a more enlightened one considered simply as a particular sexual preference. While various institutions such as the government, churches, businesses, and other segments of society are becoming more tolerant or accepting of homosexuals, the majority of people are not and are still operating from a base of ignorance and prejudice.

The American legal system attempts to remain impartial, considering cases within specific legal boundaries not based on personal biases. Thus, the courts, in their deliberations, often take opposing positions to those held by society. The rights of the individual are protected and balanced against the rights of society. This judicial outlook is illustrated by the legal principles emerging from cases dealing with homosexuals and the public schools. Normally, teachers can be dismissed and teaching credentials can be revoked for homosexual activities only when public, criminal conduct occurs. Otherwise, a homosexual teacher's private behavior, as long as it does not interfere with teaching performance, cannot be the basis for any discriminatory employment practices. The same principle has been applied to pregnant teachers, religious practices of teachers, and political activities of teachers.

One interesting point worth mentioning is that seven of the ten cases dealing with homosexuals and the public schools arose in California beginning in the 1960's. Two other cases occurred in the west, one in Oregon and one in Washington. Along with this legal development, it should be noted that the Gay Liberation Movement in the United States also began in California. As the movement increased in numbers and gained strength, some homosexual teachers found sufficient courage and support from the movement to take a stand against the arbitrary practices of past boards which probably demanded resignations in exchange for keeping the incidents of disclosures quiet. In considering these two parallel developments, it should be noted that many writers consider happenings in California to be a barometer. That is, what occurs in California will probably occur elsewhere in the country in the years to come. There is a great deal of merit to this assumption.

As the Societal Views and Legal Views of Homosexuality Change, it will be Necessary to Upgrade the Knowledge of Educators.

While there is no clear-cut research to indicate that educators are uninformed about homosexuality, there is also no reason to assume that educators are significantly more knowledgeable about it compared to the general population. Many educators probably do not adequately understand the nature of homosexuality. As they are forced to deal with it more openly, pre-service and in-service treatment of the topic of homosexuality will be needed.

The objective of this training must be to increase understanding of homosexuality as a way to increase acceptance of it. Educators, and particularly administrators and others in leadership positions, must be prepared to accept an end to discrimination based on a sexual orientation.

Court Litigation will Increase Involving Homosexuals and Public Schools.

School authorities and boards of education will likely find themselves facing cases similar to those cited above and they will have to deal with them by considering the existing and evolving societal mores and laws. Homosexuality per se, as long as it does not interfere with teaching performance, will have to be accepted. As is the case with desegregation, some people will likely be unwilling to accept the rights of homosexuals even in the face of court action. However, as long as this country and its public schools espouse democratic principles, the Constitution, through court interpretation, will continue to insure that the civil rights of individuals are respected and protected equally under the law.

Litigation on Homosexuality should be Adequately Reviewed in Graduate Courses on School Law.

The court rulings on homosexuality will not present a consistent picture across the country. Most of the rulings will be from state courts and, while a general liberalizing trend will occur, the rulings of courts at any one time may be quite different. In view of this situation, it will be important for courses on school law, offered as part of administrator preparation programs to adequately describe local conditions. If a significant Supreme Court ruling is forthcoming on the topic, the state to state variations may be reduced or eliminated.

CONCLUSION

As noted at the beginning of this article, homosexuality, the law, and public schools are coming together with dynamic results. As with issues such as desegregation and the rights of women, school administrators will help to determine the course that educational institutions will take. In the cases of blacks and women, the choice by many administrators was to do little until forced to act by the courts. With homosexuals and their rights, the same course will produce the same disruption and drain on the resources of the educational system, most likely leading to costly and time-consuming court action. The end point—acceptance of homosexuality as a personal issue of no concern to schools unless it interferes with the learning of students—is not really in doubt. The unknown is how public schools will move toward that position.

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Speech and Expression Outside the Classroom as Elements of a School Board's Determination of Teaching Fitness: A Case Study of a Gay Activist

Joseph A. Rizzi
School Board Attorney
Member of the New York and New Jersey Bars

Robert M. Jacobs
School Board Attorney
Member of the New Jersey Bar

It may safely be said that among the most crucial and significant responsibilities of a local board of education, in carrying out its mandate to administer and operate a school district effectively, is the responsibility to determine and insure the competence and fitness of those individuals who provide teaching services to school children. That responsibility has long and consistently been recognized by the legal community, and has found expression at all levels of the judicial system, including the United States Supreme Court. In fact, that responsibility is, without question, not merely a valid concern but is classifiable as a vital and compelling state interest. This was expressed by the United States Supreme Court as follows:

> There can be no doubt of the right of a State to investigate the competence and fitness of those whom it hires to teach in its schools, as this Court before now has had occasion to recognize. 'A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern.' *Adler v. Board of*

> *Education*, 342 U.S. 485, 493, 96 L. Ed 517, 524, 72 S. Ct. 380, 27 ALR 2d 472.[1]

In *Adler v. Board of Education*,[2] the United States Supreme Court had also stated that it "cannot be doubted" that "school authorities have the right and duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society...."

The conclusion that the state has a vital and compelling interest in the competence and fitness of teachers to teach has given rise, however, to controversy as to the scope of a local board's permissible inquiry. More specifically, the issue involves the question of whether a local board's permissible inquiry may extend beyond, and outside, the schoolhouse door.

The consistent judicial response has been that, with certain exceptions involving the nature of an activity outside the classroom and the motivation for an examination of such activity, board inquiry and scrutiny is not limited to a teacher's classroom conduct, but may, in fact, extend beyond the classroom and the schoolhouse door. As expressed by the Supreme Court in *Shelton*, "There is 'no requirement in the federal Constitution that a teacher's classroom conduct be the sole basis for determining his fitness. Fitness for teaching depends on a broad range of factors.' *Beilan v. Board of Education*, 357 U.S. 399, 406, 2 L. Ed. 2d 1414, 1420, 78 S. Ct. 1317."[3]

Implicit in the Supreme Court's reference to a "broad range of factors" is a judicial belief that the determination of teaching competence and fitness cannot be limited to an inquiry by a local board as to whether a teacher satisfies certain minimum educational requirements to teach, possesses a certain minimum amount of substantive knowledge in the field in which he teaches, and possesses teaching abilities which would allow him to successfully convey and impart such substantive knowledge to students. Rather, both educational and legal analyses make it clear that such elements constitute only a portion of a broader concern and definition of "fitness." An inquiry into "fitness" must include, for instance, an inquiry as to whether, by his actions or conduct both within and without the classroom, a teacher either presents the potential of harm to the safety or well-being of students or has, in some respect, impaired his ability to teach, discipline or associate with such students.

The purpose of the present discussion is not to focus upon criminal or immoral teacher conduct outside the classroom which results in a determination by a local board to seek to discharge a teacher. Rather, it is to examine an unsettled area in which a board seeks to determine a teacher's continuing fitness to teach based upon concerns raised by the teacher's speech, expression and association outside the classroom, conduct which the teacher claims is absolutely protected by the first amendment to the United States Constitution.[4]

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[1] Shelton v. Tucker, 364 U S. 479, 485 (1960.
[2] 342 U.S. 485, 493 (1952).
[3] Shelton v. Tucker, 364 U.S. 479, 485 (1960).

It is a well-established principle of constitutional law that, contrary to the view of some who assert that first amendment rights are absolute, the first amendment rights of speech, expression, and association are not absolute in that a compelling state interest may justify their incidental invasion or inhibition.[5]

Recent litigation in the State of New Jersey, involving a local board's attempt to determine the "fitness" of a teacher, provides an interesting and illustrative example of the interaction between the judicial resolution of the two divergent views concerning the absolute nature of first amendment rights on the one hand and a compelling state interest which may justify the invasion or inhibition of such rights on the other hand. The discussion which follows is also intended to provide insight into the nature of the legal problems which a local board may reasonably anticipate confronting in its attempt to determine the continuing "fitness" of a teacher to perform his teaching duties.

GISH V. BOARD OF EDUCATION OF BOROUGH OF PARAMUS:[6] THE FACTS

John Gish has been employed since 1965 by the Board of Education of the Borough of Paramus, New Jersey as a teacher of English and related subjects at Paramus High School. On June 14, 1972, John Gish was elected President of the Gay Activist Alliance of New Jersey and he announced, at a meeting on that date attended by teacher representatives of the various schools in the Paramus School District, that the news of his election would be made public as of June 15, 1972. Thereafter, although the Superintendent of Schools expressly requested Mr. Gish to refrain from publicizing or seeking publicity concerning his election or his interest in the Gay Activist Movement because of the possibility of an adverse impact upon his relationship with students and parents and upon his functioning as a teacher in the community, Mr. Gish was the subject of widespread publicity in various publications, including *The Record*, a newspaper with a daily circulation of approximately 150,000 copies, *The Neward Evening News*, then a newspaper with statewide circulation in New Jersey, and *The New York Times*. In addition, Mr. Gish participated in numerous other activities on behalf of the cause of the Gay Activist Movement, including, for example, a Gay Teachers' Caucus at the 1972 National Education Association Convention in Atlantic City. The aim of the caucus, Mr. Gish was quoted as stating, was to have homosexuals included in any reference to ethnic minority groups in a new National Education Association Constitution to be ratified at the Convention. His activities also included participation in a "Hold Hands Demonstration," organized and conducted on May 6, 1973 by the Gay Activist Alliances of New Jersey and New York on the George Washington Bridge, and participation in speaking engagements designed to promote the cause of the Gay Liberation Movement at, among other schools, Middlebury College and Rutgers University.

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[4] The first amendment to the United States Constitution provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble . . ." First amendment rights are protected against abridgement by state action by the provisions of the fourteenth amendment. *See, e.g.*, Thornhill v. Alabama, 310 U.S. 88 (1940).

[4] *See, e.g.*, United States v. O'Brien, 391 U.S. 367 (1968); DeGregory v. Attorney General of the State of N. H., 383 U.S. 825 (1966); Younger v. Harris, 401 U.S. 37 (1971); Brazburg v. Hayes, 408 U.S. 665 (1972).

[6] 366 A.2d 1337 (N.J. Super. Ct. App. Div. 1976), *cert. denied*, 46 U.S.L.W. 3220 (U.S. Oct. 4, 1977) (No. 77-3). The activities of Mr. Gish were ultimately determined by the Commissioner of Education of New Jersey and the Appellate Division of the Superior Court of New Jersey to be, in large measure, factually uncontroverted. The Appellate Division also found that the determination of the challenge to the Board's directive that Mr. Gish undergo a psychiatric examination depended upon the application of constitutional and legal principles, rather than upon a dispute of the substantive facts.

GISH V. BOARD OF EDUCATION OF BOROUGH OF PARAMUS: STATUTORY BACKGROUND

The courts of the State of New Jersey have consistently recognized that the authority to determine whether a teacher is fit to teach, or to continue to teach, has been delegated by the New Jersey Legislature to local boards of education.[7] As an aid for such a determination of fitness, the laws of the State of New Jersey provide:

> *Every board of education* shall require all of its employees, and may require any candidate for employment, to undergo a physical examination,...and *may require additional individual psychiatric or physical examinations of any employee, whenever, in the judgment of the board, an employee shows evidence of deviation from normal, physical or mental health....*[8]

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[7] *See, e.g.*, Laba v. Newark Bd. of Educ., 23 N.J. 364, 129 A.2d 273 (1957).

[8] N.J. Stat. Ann. § 18A:16-2 (West 1968) (emphasis added). The succeeding statutory section, not relevant to the discussion herein, provides a mechanism and procedure for the selection of a physician or institution to conduct such examination.

GISH V. BOARD OF EDUCATION OF BOROUGH OF PARAMUS: ACTIONS OF THE BOARD AND CONSTITUTIONAL CHALLENGE TO THE STATUTE

As a result of the above described actions on the part of Mr. Gish, and of the above described publicity which the Board contended was a natural and foreseeable consequence of such actions, the Paramus Board of Education consulted with two psychiatrists. The first, its School Consulting Psychiatrist, stated that, in his professional opinion, and with a reasonable degree of medical certainty, the course of action undertaken by Mr. Gish would have a tendency to result in a strong possibility of potential psychological harm to students of the Paramus School District as a result of their continued association with Mr. Gish. The second, after the presentation to him of a Statement of Hypothetical Facts, rendered an opinion that, in his opinion, Mr. Gish showed evidence of deviation from normal mental health. The Board thereupon determined to require Mr. Gish to undergo a psychiatric examination pursuant to the terms of N.J. Stat. Ann. § 18A:16-2. That determination of the Board was based upon the Board's judgment that a strong possibility of potential harm to students would exist as a result of their continued association with Mr. Gish. The determination was made so as to permit a medical expert to confirm or disprove the Board's opinion that Mr. Gish's "fitness" to continue to teach and associate with students was impaired.

Shortly thereafter, an action was commenced in the Superior Court of New Jersey by Mr. Gish, as one of two named plaintiffs in a class action, challenging the constitutionality of N.J. Stat. Ann. § 18A:16-2 upon various substantive grounds.[9] The challenge included an allegation that the statute was unconstitutional for vagueness as a result of its failure to define "deviation from normal . . . mental health," and an allegation that the statute, in its application, operated to impinge upon constitutional rights of association, expression and privacy.[10] In rejecting plaintiffs' claim of unconstitutionality, the Chancery Division of the Superior Court of New Jersey construed the term "deviation from normal . . . mental health" to mean a "harmful, significant deviation from mental health affecting the teacher's ability to teach, discipline or associate with children of the age of the children subject to the teacher's control in the school district."[11] Based upon such a construction of the statutory language, the court was able to determine that the legislature of the State of New Jersey had delineated, in as narrow terms as possible, an area of unfitness which a teacher may evidence by his behavior, and had delegated to local boards the power to request that a teacher who, in the judgment of the board, shows such evidence of harmful, significant deviation undergo a psychiatric examination. The court stated that the legislative "grant of power to a board of education to require such an examination is viewed merely as an extension of the board's authority to require a teacher to answer questions at a hearing on general unfitness," which had previously been held proper by the New Jersey Supreme Court in *Laba v. Newark Board of Education.*[12] Significantly, the court stated that "the legislature is concerned with protecting school children from the influence of unfit teachers" and that "protection of school children from teachers who have shown evidence of harmful, significant deviation from normal mental health is without question not only a valid legislative concern but one classifiable as a compelling state interest."[13]

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[9] Kochman and Gish v. Keansburg Bd. of Educ., 305 A.2d 807 (N.J. Super. Ct. Ch. Div. 1973).

[10] An additional asserted basis for the claim of unconstitutionality was an assertion that the statute failed to provide adequate procedural standards to govern a local board in requiring a psychiatric examination.

[11] Kochman and Gish v. Keansburg Bd. of Educ., 305 A.2d 807 (N.J. Super. Ct. Ch. Div. 1973).

As a result, the court found that although the statute, in its application to the case before it and as it may be utilized by local boards to determine continued "fitness" to teach, *may* intrude upon a teacher's rights of association, expression and privacy, that fact did not render the statute unconstitutional because there exists a compelling state interest in the protection of school children from the influence of unfit teachers, an interest which overrides private rights.[14]

GISH V. BOARD OF EDUCATION OF BOROUGH OF PARAMUS: APPLICATION OF CONSTITUTIONAL PRINCIPLES

The determination of the Superior Court of New Jersey in *Kochman and Gish* upholding the provisions of N.J. Stat. Ann. § 18A:16-2 as a constitutional mechanism to enable local boards to determine the continued fitness of teachers, is consistent with, and readily understandable in the context of, the judicial pronouncements of the U.S. Supreme Court in *Shelton v. Tucker*[15] with regard to the compelling and vital interest of states in the protection of school children from the influence of unfit teachers. The decision in *Kochman and Gish* is also consistent with the holding of the U.S. Supreme Court in *United States v. O'Brien*,[16] a case involving a person's knowingly destroying and mutilating a draft card in violation of the penal provisions of the Universal Military Training and Service Act, in which the Court said:

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[12] 23 N.J. 364, 129 A.2d 273 (1957).

[13] Kochman and Gish v. Keansburg Bd. of Educ., 305 A.2d 807, 812 (N.J. Super. Ct. Ch. Div. 1973).

[14] With regard to the argument of unconstitutionality based upon procedural defects, the court determined that when a board of education intends to require a psychiatric examination, it must give the teacher a statement of its reasons for requiring the examination and it must afford the teacher a hearing, if requested, concerning its reasons for requiring the examination, and that such procedure, together with the right of the teacher to appeal a board's decision to the Commissioner of Education, the State Board of Education, and, ultimately the courts, would satisfy procedural due process requirements. In a separate challenge to the constitutionality of N.J. Stat. Ann. § 18A:16-2, on similar procedural grounds, the United States District Court for the District of New Jersey also upheld the statute as constitutional in Hoffman v. Jannarone, 401 F.Supp. 1095 (D.N.J. 1975).

> This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, *we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.* We find that the 1965 Amendment to § 12(b)(3) of the Universal Military Training and Service Act meets all of these requirements, and consequently that O'Brien can be constitutionally convicted for violating it.[17]

An example of the manner in which first amendment rights may be "invaded" is provided in the case of *Anderson v. Sills*[18] wherein the New Jersey Supreme Court was concerned with the critical power of government to use a reporting system in order to gather and compile information relating to potential and actual civil disorders. The New Jersey Supreme Court stated:

> The question in the case is not merely whether there are some individuals who might be "chilled" in their speech or associations by reason of the police activity here involved. Rather the critical question is whether that activity is legal, and although the amount of "chill" might in a given case be relevant to the issue of legality, the fact of "chill" is not itself pivotal. . . . If there is no intention [on the part of the State] to control the

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[15] 364 U.S. 479 (1960).

[16] 391 U.S. 367 (1968).

[17] *Id.* at 376-377 (emphasis added).

[18] 56 N.J. 210, 265 A.2d 678 (1970).

> content of [a citizen's] speech, an overriding public need may be met even though the measure adopted to that end operates incidentally to limit the unfettered exercise of the First Amendment right. . . . If a properly drawn [statute, regulation, directive, order, or communication] is within the power of government, it is no objection that the exercise of speech or association is thereby "chilled".[19]

The limits and parameters of such *lawful* invasion or inhibition of first amendment rights of speech, expression and association, based upon a state's compelling interest in the protection of school children by means of a determination of the continued fitness of a teacher, may be more readily understood by a reference to the burgeoning case law on the subject of *impermissible* invasions by boards upon the first amendment rights of teachers. Such impermissible invasions, with their "chilling effects" upon speech, expression or association, generally in the form of the non-renewal of teachers' contracts, or the attempted discharge of teachers, were dealt with by the U.S. Supreme Court in the landmark case of *Pickering v. Board of Education.*[20] In this case involving a teacher's letter sent to a local newspaper sharply criticizing the administration and containing four statements which were false, the U.S. Supreme Court expressly recognized that "the State has interests as an employer in regulating the speech of its [teacher] employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general."[21] Nevertheless, the Court went on to state that the question of whether the speech of a teacher is constitutionally-protected expression necessarily entails striking "a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State as an employer, in promoting the efficiency of the public services it performs through its employees."[22] The Supreme Court, in holding that the dismissal of Pickering violated his first amendment rights, summed up as follows:

> What we do have before us is a case in which a teacher has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally. In these circumstances we conclude that the interest of the school

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[19] *Id.* at 226-227, 265 A.2d at 687.

[20] 391 U.S. 563 (1968).

[21] *Id.* at 568.

[22] *Id.*

> administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.[23]

In applying a balancing test, as established by the U.S. Supreme Court, the federal district courts and courts of appeals, as well as the various state courts, have consistently held that the non-renewal of even a non-tenured teacher may not be predicated upon the teacher's exercise of first amendment rights, but must be predicated upon the need on the part of the state to promote the efficiency of the public services it performs through its teachers.[24] These courts have also held that a decision of a local board to terminate the employment of a teacher which is *only partially in retaliation* for the exercise of a constitutional right is likewise unlawful.[25]

The case of *Wagle v. Murray*[26] is illustrative of the analytical process applied by the judiciary to determine whether the attempted termination of a teacher's employment is unlawfully in retaliation for the exercise of first amendment rights of free speech, or whether such an attempted termination followed speech which was so excessive or burdensome to the school district as to "fail" the balancing test established in *Pickering* (*i.e.*, speech which either impeded the teacher's proper performance of his daily duties in the classroom or interfered with the regular operation of the schools generally). In the case of *Wagle v. Murray*, a high school teacher of five years, whose competency as a teacher had never been seriously challenged, was terminated by the local board. The teacher, who alleged that the termination was in retaliation for his exercise of first amendment rights of free speech, had been elected chairman of a local chapter of the American Civil Liberties Union (ACLU). In correspondence to a local newspaper, he had challenged long-accepted practices at the high school on the grounds that they allegedly violated the constitutional separation of church and state. He had also written to the newspaper defending the ACLU position favoring the legalization of marijuana. The board, in terminating the employment of the teacher, did *not* contend that the teacher's expressive activities had a disruptive impact upon the school. It simply argued that its decision to terminate was based on assertions that the teacher was an ineffective teacher and that his expressive activities did not influence its decision except to the extent that the expressive activities may have interfered with his teaching. As a result, at a jury trial in the United States District Court for the Western District of Washington, the issue submitted to the jury was as follows: "Was the plaintiff non-renewed for probable cause because he had become an ineffective teacher, or because of his exercise of his constitutionally protected rights of free speech and association?"[27] Upholding a jury verdict and finding for the teacher (the district court had reversed the jury verdict by entering a judgment notwithstanding the verdict), the Court of Appeals for the Ninth Circuit held that, based upon the evidence, the jury could reasonably have inferred that the termination was motivated by the public expression of controversial issues, and thus was an unlawful termination under the rationale of *Pickering v. Board of Education.*[28]

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[23] *Id.* at 573.

[24] *See, e.g.*, Gray v. Union County Intermediate Educ. Dist., 520 F.2d 803 (9th Cir. 1975), wherein a special education teacher unsuccessfully alleged that the non-renewal of her contract was in retaliation for her exercise of first amendment rights in attempting to assist a pregnant, retarded student by advising her that, contrary to the opinion of the State Welfare Department, she had a right to a therapeutic abortion, and following heated discussions with State Welfare Department psychiatrists, various attorneys, and the judge overseeing the girl's custody; Stolberg v. Members of the Bd. of Trustees for State Colleges of Conn., 474 F.2d 485 (2d Cir. 1973), wherein an assistant professor whose teaching contract was not renewed successfully alleged that the non-renewal was the result of his communications with other teachers regarding an anti-Vietnam War Peace Program and Memorial Service; Mabey v. Reagan, 573 F.2d 1036 (9th Cir. 1976), wherein an untenured faculty member at Fresno State College successfully alleged that the school's failure to reappoint him to his probationary teaching position was a direct result of his exercise of the constitutionally-protected right of freedom of expression with regard to his conduct and statements at an academic senate meeting.

[25] *See, e.g.*, Simard v. Board of Educ. of the Town of Groton, 473 F.2d 988 (2nd Cir. 1973), wherein a high school teacher who had served as chief negotiator for the local teachers' association in teacher contract negotiations unsuccessfully alleged that his non-renewal was in retaliation for his protected activities on behalf of the teachers' association; Russo v. Central Sch. Dist. No. 1, 469 F.2d 623 (2d Cir. 1972), wherein a probationary teacher successfully alleged that her dismissal was in retaliation for her refusal to recite the pledge of allegiance; and Cook County College Teachers Union v. Byrd, 456 F.2d 882 (7th Cir. 1972), *cert. denied*, 409 U.S. 848 (1973), wherein two probationary faculty members at Chicago State College unsuccessfully alleged that their non-renewal was in retaliation for their union activities.

[26] 546 F.2d 1329 (9th Cir. 1976).

A recent decision of the U.S. Supreme Court, in the case of *Mt. Healthy City School District Board of Education v. Doyle,*[29] applies what may be a more useful analysis to the question of whether a teacher's discharge must be considered invalid, and whether relief in the form of reinstatement or damages should be afforded to the teacher, when the teacher's constitutionally-protected conduct played a "substantial part" in the school board's discharge decision. In *Mt. Healthy*, the Supreme Court stated:

> [A] rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision

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[27] *Id.* at 1334 n. 16.
[28] 391 U.S. 563 (1968).
[29] 50 L.Ed 2d 471 (1977).

> not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing.... A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.[30]

GISH V. BOARD OF EDUCATION OF BOROUGH OF PARAMUS: SUBSEQUENT LEGAL PROCEEDINGS

The Superior Court of New Jersey, in *Kochman and Gish,*[31] upheld the constitutionality of N.J. Stat. Ann. § 18A:16-2 against both procedural and substantive attacks. Subsequent to that decision, which was not appealed, the Paramus Board of Education reaffirmed its previous resolution that Mr. Gish undergo a psychiatric examination, and, in compliance with the procedural guidelines established by the court, furnish to Mr. Gish statements of reasons listing the reasons for the board's requirement that he undergo a psychiatric examination. The board also granted two hearings before the board to Mr. Gish to provide him with an opportunity to persuade the board of the unreasonableness or incorrectness of its judgment that his conduct evidenced harmful, significant deviation from normal mental health and affected his ability to teach, discipline or associate with children of the age subject to his control in the school district. Following such hearings, Mr. Gish was once again directed, pursuant to the provisions of the New Jersey statute, to undergo a psychiatric examination based upon the board's continuing judgment concerning his conduct, a judgment which the board sought to confirm or disprove by the requested psychiatric examination.

Subsequent to the final directive of the board, Mr. Gish appealed to the Commissioner of Education of the State of New Jersey. The Commissioner upheld as lawful the board's directive that Mr. Gish submit to a psychiatric examination so as to allow the board to confirm or disprove, through the expertise of a psychiatrist, its judgment that the conduct and actions of Mr. Gish, in fact, affected his ability to teach, discipline and associate with students, and, as a consequence, impaired his fitness. The decision of the Commissioner of Education was affirmed by the State

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[30] *Id.* at 482-3.

[31] Kochman and Gish v. Keansburg Bd. of Educ., 305 A.2d 807 (N.J. Super. Ct. Ch. Div. 1973).

Board of Education of New Jersey and by the Appellate Division of the Superior Court of New Jersey in *Gish v. The Board of Education of the Borough of Paramus*[32] A petition for certification to the Supreme Court of New Jersey was denied on March 15, 1977 and on October 4, 1977, a petition for a writ of certiorari was denied by the United States Supreme Court.[33]

The decisions of the Commissioner of Education of the State of New Jersey and of the Appellate Division of the Superior Court of New Jersey were uniformly consistent with the principles previously discussed. These principles, of course, revolve around not only the overriding and compelling interest of a local board of education in the continued fitness of its teachers, but also the broad range of factors, including, in appropriate cases, a teacher's speech, expression and association outside the classroom which may be relevant to a determination of continued fitness. The Appellate Division stated, in pertinent part:

> The right to speak freely has long been recognized as being not without some restriction. Whether or not it is constitutionally permissible may depend on its timing, its substance, its purpose, its truthfulness and other factors. It is certain that the guarantee is dependent on the circumstances of each particular instance. . . .
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> The board does not question the right of Gish to say or to do any of the things which are mentioned in [its] statement of reasons. It simply contends that. . . Gish's actions display evidence of deviation from normal mental health which may affect his ability to teach, discipline and associate with the students.
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> School boards are entrusted . . . with the duty of determining the general issue of fitness of teachers. . . their obligation to determine the fitness of teachers is a reflection of their duties to protect the students from a significant danger of harm, whether it be physical . . . or otherwise. . . . And they need not wait until the harm occurs; a reasonable possibility of its occurrence warrants such action.
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> A teacher's fitness may not be measured "solely by his or her ability to perform the teaching function and ignore the fact that the teacher's presence in the classroom might, nevertheless, pose a danger of harm to the students for a reason not related to academic proficiency."
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> . . . Human nature is such that beliefs and attitudes may not be shed by a teacher as he steps into the classroom.[34]

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[32] 336 A.2d 1337 (N.J. Super. Ct. App. Div. 1976), *cert. denied*, 46 U.S.L.W. 3220 (U.S. Oct. 4, 1977) (No. 77-3).

[33] As of the date of preparation of this paper, no psychiatric examination of Mr. Gish has been conducted.

[34] Gish v. Board of Educ. of the Borough of Paramus, 336 A.2d 1337, 1341-1342 (N.J. Super. Ct. App. Div. 1976).

The Appellate Division concluded that the board's determination that the conduct and actions of Mr. Gish in fact affected his ability to teach, discipline and associate with students, premised *in part* as it was upon certain public expression by Mr. Gish, "was a fair and reasonable one, a determination which as stated by the Commissioner is 'one which could logically be made by reasonable and fair-minded men who have evaluated petitioner's behavior and who are concerned with petitioner's fitness to be a teacher in intimate contact with numbers of impressionable, adolescent pupils'."

"SEXUAL EXPRESSION" AND FITNESS

On first impression, it may appear that the statutory framework sought to be utilized by the Paramus Board of Education to confirm or disprove its determination as to the lack of fitness of a teacher to teach is of limited or no usefulness to school boards outside of the jurisdiction of New Jersey. However, upon close analysis, it cannot be gainsaid that the definition of the statutory phrase "deviation from normal mental health," as enunciated by the trial court in *Kochman and Gish*, provides to *all* boards of education a significant standard for use in one area of potential "unfitness" to teach, namely, harmful, significant deviation from normal mental health affecting the teacher's ability to teach, discipline or associate with children of the age of the children subject to the teacher's control in the school district.

In fact, a review of recent judicial decisions concerning the "fitness" of teachers, in a range of cases involving what may be generally characterized, over a wide continuum or spectrum, as "sexual expression," reveals that tests similar to that enunciated in *Kochman and Gish* have been recognized and utilized by the courts in making "fitness" determinations.

For instance, in another recent, significant New Jersey case, *In the Matter of the Tenure Hearing of Paula M. Grossman*,[36] the courts of the State of New Jersey were confronted with determining the continued fitness of a male teacher, Paul Grossman, whose form of "sexual expression" consisted of being a transsexual who had undergone sex-reassignment surgery to change his external anatomy to that of a female. Following such surgery, and in the wake of the notoriety within the school system and the community which, in the judgment of the school board, impaired the board's ability to conduct an efficient and orderly school system, the board filed written charges with the Commissioner of

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[35] *Id.* at 1342.

[36] 127 N.J. Super. 13, 316 A.2d 39 (App. Div.), *cert. denied*, 65 N.J. 292, 321 A.2d 253 (1974).

Education seeking to discharge Paula Grossman, a tenured teacher for incapacity to teach, among other grounds. Following hearings, the Commissioner of Education determined, after weighing conflicting psychological testimony, that Paula Grossman had rendered herself incapable of teaching children in Bernards Township because of the potential for psychological harm to the students created by her presence in the classroom. As a result, the Commissioner directed that the teacher be dismissed. Upon appeal to the Appellate Division of the Superior Court of New Jersey, the court reviewed the testimony with regard to the question of the potential impact upon students of a teacher who had undergone such surgery and suggested that the problem to be resolved was whether "incapacity" could be established solely by a finding that a teacher would have an adverse effect upon students in the classroom. In determining that "incapacity" is directly related to "fitness" to teach, the court expressly acknowledged that fitness to teach is not based exclusively on a teacher's classroom proficiency or the absence of misconduct. It determined that such fitness may be impaired or negated by a potential for psychological harm to students which may be created by a teacher's presence in the classroom. In *Grossman*, the finding of the Commissioner of Education, based upon psychological testimony, was that the presence in a classroom of a sexually reassigned transsexual teacher whose former sexual identity was known to the children would have a negative effect on the mental health of the children and would result in the loss by that teacher of psychological control over the children. The Appellate Division did not disturb that finding and concluded that the potential for psychological harm to students resulted in the establishment of the teacher's incapacity.[37]

In another recent case involving more traditional sexual expression, the Court of Appeals for the Fourth Circuit had occasion to consider a suit instituted by a junior high school science teacher in which the teacher alleged that his transfer from a classroom position to an administrative position was arbitrary and unlawful and was the result of a disclosure to the Board of Education of the fact that he was a homosexual.[38] The teacher had been, while a student at Pennsylvania State University, a member of an organization known as Homophiles of Penn State, an organization which had as its purpose the development of public understanding concerning homosexuality. The teacher had been an officer and had been active in the activities of the organization. Upon graduation, he sought a teaching position with the defendant Board and was employed without the Board's knowledge that he was a homosexual, a fact which was not disclosed until several weeks after the opening of school. At that time, the Board transferred the teacher resulting in public discussion of the case and in the teacher's granting several press and television interviews in which, while stating that he did not advocate homosexuality, he sought community acceptance. The relief sought by the teacher was re-instatement to the classroom. The court of appeals was faced with determining whether the actions of the teacher, in publicizing his dispute with the school district, impaired his teaching capacity. The court found that there was, in fact, no evidence that the press or television interviews disrupted the school, substantially impaired his capacity as a teacher, or gave the school officers reasonable grounds to forecast that such results would follow from what was said by the teacher. As a result, the court held that Mr. Acanfora's public statements were protected by the first amendment and did not justify either the action taken by the Board (the transfer) or the dismissal of his suit.[39]

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[37] In an interesting limitation upon its holding, the Appellate Division stated that "[i]n fairness to Mrs. Grossman, we emphasize that the Commissioner's conclusions relate only to her fitness to continue teaching in the Bernards Township school system. We express no opinion with respect to her fitness to teach elsewhere and under circumstances different from those revealed in the present case." *Id.* at 32, 316 A.2d at 49.

[38] Acanfora v. Board of Educ. of Montgomery County, 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974).

Finally, in a recent case which has undoubtedly attracted the greatest amount of publicity and evoked the greatest amount of controversy of all recent judicial discussions on the question of the determination of teacher fitness, the Supreme Court of the State of Washington, in *Gaylord v. Tacoma School District No. 10*,[40] considered the difficult and highly emotional question of whether a teacher's sexual expression, in the form of his status as a homosexual, and the subsequent public disclosure to school officials and students of such homosexual status, would adversely affect that teacher's performance, and, as a result, impair his fitness to teach, thereby justifying his discharge.

Briefly stating the facts, James Gaylord had been a high school teacher for more than twelve years, during which time the periodic evaluations of his teaching performance were all highly favorable. Testimony disclosed that while Mr. Gaylord had experienced homosexual inclinations for approximately twenty years, and had sought out and established contact with others of the same inclination in recent years, none of Mr. Gaylord's superiors, students or colleagues were actually aware of his homosexual status until 1972 when, based upon the statements of a *former* student, an administrator confronted Mr. Gaylord, who thereupon admitted his *status* as a homosexual. Shortly thereafter, Mr. Gaylord was notified by the Tacoma School Board that it had found probable cause for his discharge as a teacher on the theory that he had admitted occupying a public status incompatible with the conduct required of teachers, specifically, the *status* of being a publicly known homosexual. While there was no evidence of the commission by Mr. Gaylord of any overt homosexual acts, the specific ground for discharge advanced by the Board was "immorality."[41]

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[39] The court was able to determine, however, on a more narrow issue that the teacher was not entitled to the relief sought. This holding was based upon a finding that Mr. Acanfora had been guilty of misrepresentation because of material omissions on his application for the teaching position with regard to his membership in the college homosexual organization.

[40] 85 Wash. 2d 348, 535 P.2d 804 (1975), *rehearing*, 88 Wash. 2d 286, 559 P.2d 1340 (1977), *cert. denied*, 46 U.S.L.W. 3220 (U.S. Oct. 4, 1977) (No. 77-91).

Following an administrative hearing conducted by the Board at Mr. Gaylord's request, the Board affirmed the discharge. Mr. Gaylord appealed the discharge and, following a de novo judicial hearing, the trial court held that homosexual conduct was immoral, that public knowledge of it adversely affected the teacher's performance, and that such conduct and the adverse effects thereof were sufficient cause for discharge. Upon appeal to the state supreme court, the trial court's decision was reversed based upon the trial court's misinterpretation of a statutory burden of proof provision. The case was remanded to the trial court for further consideration. Following reconsideration by the trial court, it once again concluded that the teacher's homosexual *status*, which did not affect his teaching efficiency while it was unknown to others, did impair his efficiency when it became publicly known.

Upon a second appeal to the state supreme court, the crucial issue faced by the court was whether substantial evidence supported the trial court's finding that, as a known homosexual and without any evidence of overt homosexual acts on his part, Mr. Gaylord's fitness as a teacher was impaired, to the injury of the school district, thus justifying his discharge.[42]

In affirming the trial court's decision that Mr. Gaylord's performance as a teacher was sufficiently impaired by his known homosexuality to warrant his discharge, the Supreme Court of Washington specifically upheld the following findings of fact made by the trial court:

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[41] The "immorality" ground for discharge was contained in the local school board policy, which was promulgated based upon the broad management powers granted to local boards of education, by state statute, to discharge teachers for "sufficient cause."

[42] The initial question faced by the Washington Supreme Court was whether substantial evidence supported the trial court's conclusion that Mr. Gaylord was guilty of "immorality" within the meaning of the school board policy treating immorality as sufficient cause for discharge. Citing Morrison v. Bd. of Educ., 461 P.2d 375 (Cal. 1969), the Court held that such a determination of immorality must be coupled with a finding of resulting actual or prospective adverse performance as a teacher (*i.e.*, unfitness to teach), or be, potentially, a constitutionally infirm standard for undue vagueness. Thereafter, based upon Mr. Gaylord's own testimony, upon his failure to come forth at trial to "explain that he was not an overt

> "[W]hile plaintiff's status as a homosexual [was] unknown to others in the school," his teaching efficiency was not affected nor did his status injure the school. When, however, it became publicly known that Gaylord was a homosexual "the knowledge thereof would and did impair his efficiency as a teacher with resulting injury to the school had he not been discharged." (Finding of fact No. 9).
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> "A teacher's efficiency is determined by his relationship with students, their parents, fellow teachers and school administrators. In all of these areas the continued employment of appellant after he became known as a homosexual would result, had he not been discharged, in confusion, suspicion, fear, expressed parental concern and pressure upon the administration from students, parents and fellow teachers, all of which would impair appellant's efficiency as a teacher and injure the school." (Finding of fact No. 10).[43]

In upholding said findings of fact, the Washington Supreme Court stated:

> It is important to remember that Gaylord's homosexual conduct must be considered in the context of his position of teaching high school students. Such students could treat the retention of the high school teacher by the school board as indicating adult approval of his homosexuality. It would be unreasonable to assume as a matter of law a teacher's ability to perform as a teacher required to teach principles of morality . . . is not impaired and creates no danger of encouraging expression of approval and of imitation.[44]

It is significant to note, in this discussion of the nature of expression by a teacher which may form the basis for concern by a board as to the teacher's continuing fitness to teach, that the Washington Supreme Court rejected Mr. Gaylord's contentions that his form of expression, namely, his status as a homosexual, became known *only after the school district itself made it known*, and that he should not, therefore, be responsible for such expression. In rejecting his contentions, the Washington Supreme Court stated:

> First, by seeking out homosexual company he took the risk his homosexuality would be discovered. It was he who granted an

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homosexual and did not engage in the conduct the Court ascribed to him which the Court found immoral and illegal," Gaylord v. Tacoma Sch. Dist. No. 10, 559 P.2d 1340, 1344 (Wash. 1977), and based upon its adoption of the trial court's finding of fact (Number III) that "[f]rom appellant's own testimony it is unquestioned that homosexual acts were participated in by him, although there was no evidence of any overt acts having been committed. . .," *Id.* at 1344, the court determined that such homosexual acts, constituting sodomy and lewdness under the Washington statutes, impart an immoral status to his conduct.

[43] *Id.* at 1346.

[44] *Id.* at 1347.

> interview to the boy who talked to him about his homosexual problems. The boy had been referred to Gaylord for that purpose by the homosexual friend to whom Gaylord had responded favorably in answering his [friend's] advertisement in the paper of the Dorian Society. As a result of that interview the boy came away with the impression plaintiff was a homosexual and later told the assistant high school principal about the matter. The latter in turn conferred with plaintiff for the purpose of verifying the charge that had been made. It was the vice-principal's duty to report the information to his superiors because it involved the performance capabilities of Gaylord. The school cannot be charged with making plaintiff's condition known so as to defeat the school board's duty to protect the school and the students against the impairment of the learning process in all aspects involved.[45]

Such a holding by the court seems to open nearly all forms of sexual expression by teachers to justified school board concern as to continued fitness. Mere status, without disclosure by the individual himself of such status and without any speech or proselytization of that status or of a position or cause, may be sufficient to justify board action if coupled with legitimate state concerns as to its effect upon the teacher's relationship with students or upon the regular operation of the schools.

Finally, in affirming Mr. Gaylord's discharge as based upon substantial evidence, the Washington Supreme Court agreed with the decision of the Appellate Division of the Superior Court of New Jersey in *Gish*[46] to the effect that, in fullfilling their obligation to determine fitness of teachers and their concomitant duty to protect students from a significant danger of harm, school boards need not wait until the harm occurs; a reasonable possibility of its occurrence warrants such action. With respect thereto, it said that:

> To say that school directors must wait for prior specific overt expression of homosexual conduct before they act to prevent harm from one who chooses to remain "erotically attracted to a notable degree towards persons of his own sex and is psychologically, if not actually disposed to engage in sexual activity prompted by this attraction" is to ask the school directors to take an unacceptable risk in discharging their fiduciary responsibility of managing the affairs of the school district.[47]

In a strenuous dissent, Justice Dolliver argued, citing *Acanfora v. Board of Education*,[48] that the Board had failed to establish that Mr.

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[45] *Id.* at 1346.

[46] Gish v. Board of Educ. of Borough of Paramus, 336 A.2d 1337 (N.J. Super. Ct. App. Div. 1976), *cert. denied*, 46 U.S.L.W. 3220 (U.S. Oct. 4, 1977) (No. 77-3).

[47] Gaylord v. Tacoma Sch. Dist. No. 10, 559 P.2d 1340, 1347 (Wash. 1977).

[48] 359 F. Supp. 843 (D.MD. 1973).

Gaylord's performance as a teacher was impaired by his homosexuality, that homosexuality per se does not preclude competence and that the testimony at trial with respect to the effect that Mr. Gaylord's homosexuality might have on his classroom effectiveness was mere speculation and conjecture. In concluding his dissent, Justice Dolliver stated that "to base a dismissal on the proof of a status with no showing of conduct and no showing of an actual detrimental effect on teaching efficiency violated the constitutional due process rights to which Mr. Gaylord is entitled."[49]

CONCLUSION

The foregoing discussion and analysis may best be summarized in the form of certain lessons which, in the writers' opinion, are critical to local boards of education in carrying out their mandate to administer and operate their local school districts effectively. These lessons are considered critical because we live in an era of increased social and political awareness and participation by all members of society, including teachers; an era in which various forms of conduct and expression, considered by some to be either dangerous, unacceptable or merely "different," have emerged and are exercised by individuals in all walks of life and in all sectors of society, including those who work in the schoolhouse.

The decisions at the various levels of the judicial process in the cases of *Gish v. Board of Education* and *Kochman and Gish v. Keansburg Board of Education and Paramus Board of Education* provide a synthesis of these critical lessons which is consistent with an ever-expanding body of law.

The foremost lesson, implicit in every judicial decision discussed herein, is that there can be no question as to the absolute obligation and right of a local board to determine the fitness of its teachers to continue to be in contact with school children. This lesson stems from, and is a function of, the compelling state interest in the protection of school children from the influence of teachers who evidence "unfitness" in any of its infinite number of forms.

In attempting to supply local boards with a useful and workable definition of conduct which may evidence "unfitness," the courts have provided an additional, significant lesson to boards; that is, that conduct which may evidence "unfitness" is not limited to conduct in the classroom and that, in any particular case, a board must look to a broad range of factors, including conduct without the classroom, and that, in doing so, the board is in no respect limited to conduct which may be characterized as criminal or immoral. The scope of legitimate board inquiry into a teacher's fitness may, and indeed must, extend to any form of a teacher's conduct which may adversely affect the efficiency of the public services performed by teachers.

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[49] Gaylord v. Tacoma Sch. Dist. No. 10, 559 P.2d 1340, 1351 (Wash. 1977).

While it has long been unquestioned that first amendment rights are not absolute and may be invaded or inhibited by compelling state interests, the lesson of *Gish*, as well as of the numerous other decisions cited, including that of the U.S. Supreme Court in *Shelton*, is that the interest of a local board in protecting school children and in promoting the efficiency of its public services, through determinations of teacher fitness, is a compelling state interest, justifying the possible incidental invasion or inhibition of a teacher's first amendment rights.

While the cases applying the balancing test set forth in *Pickering* provide a clear lesson to local boards to the effect that the content of speech and expression may not generally form the motivation and basis for retaliatory board action, such as discharge or non-renewal; nonetheless, the lesson of *Gish* and the other cases cited clearly states that speech and expression, including what has been characterized as sexual expression, are not insulated from legitimate inquiry by a local board into the continuing fitness of those individuals who provide its teaching services.

In the final analysis, the determination by local boards of the fitness of teachers to continue to be in contact with school children requires a case-by-case application of the lessons set forth above to the particular facts of each situation. Each determination of teacher fitness is based upon evidence as to the impact and effect, if any, of a teacher's speech, expression and conduct, including sexual expression, upon his or her fitness and continuing ability to be in contact with school children. The evidence may include, but is not limited to, the testimony of administrators, teachers, parents, students and members of the community-at-large, as well as that of experts, such as psychiatrists or other psychological witnesses.

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Legal Aspects of Declining Enrollment

Thomas L. Boyer
Attorney at Law
Beer, Boltz, and Bennia
Bloomfield, Michigan

Stephen M. Nassau
Attorney at Law
Nassau, Beer, Boltz and Bennia
Washington, D.C.

Over the last five years, perhaps the most active area of litigation between school teachers and associations representing school teachers and boards of education has concerned the layoff or non-renewal of certificated teaching personnel. In most states, the competition among teachers for available positions is unprecedented. In the State of Michigan alone, there are more than twenty thousand unemployed teachers and some school districts have laid off staff members with up to eight and nine years seniority. These and other districts have not employed a probationary teacher in several years. For these reasons, teachers' associations have made legal services to resist reductions in force a primary expenditure. Therefore, it is incumbent upon school administrations and boards of education to be aware of the federal and state statutes governing layoffs and to accomplish their reduction in force needs in accordance with the applicable law.

Generally, it is necessary for boards of education to reduce their teaching staffs for one of two reasons: declining enrollment or economic exigency. Frequently, these two reasons are dependent upon one another and the layoff occurs as a result of both declining enrollment and lack of funds.

As a result of the post World War II baby boom, school districts in the 1950's and 1960's embarked upon large-scale building programs, thereby increasing the number of classrooms and the number of school teachers required. In the middle 1970's, as a result of the declining birthrate, school districts are faced with excess capacity and staff. Not only do these districts simply not need the number of teachers that they once employed, the declining enrollment often causes reduced income to the school district in the form of lower state aid payments, creating a shortage of funds with which to pay the teachers. In Michigan, state aid is paid on a per pupil basis and, consequently, when enrollment drops, so does state aid.

However, the single factor most responsible for the school districts' need to lay off teachers is the refusal of the electorate to approve millage requests. Some school districts have put on the ballot as many as four millage requests per year for each of the last two years without ever having the millage approved. A number of school districts have come to believe that it is impossible to obtain approval for three, four, or five mills at a time and have opted to put their entire millage on the ballot at one time in order to give the electorate a clear choice of either providing sufficient funds to operate the school district or having no school at all.

Millage elections are lost for a variety of reasons. One reason is probably the fact that in many areas the school millage vote is the only direct opportunity a taxpayer has to control the amount of tax he is going to pay. Therefore, the taxpayer who is already angered by paying higher income taxes, higher sales taxes, and increased social security payments has only this one opportunity to vent his anger and he does so by defeating millage requests.

Even if the school district can maintain the total mills it possessed in previous years, inflationary pressure might still necessitate the layoff of teaching personnel. If twenty-four mills produced $4,000,000 in revenue last year, that same $4,000,000 will not pay for the same number of teachers or the same quantity of electricity or school supplies this year. Even though the electorate is subject to the same kind of inflation, it cannot understand why the school district is in financial straits this year when it managed nicely on twenty-four mills last year.

Even if school districts maintain the same number of mills that they had in the past, for some districts, particularly those in urban areas in the north and the east, the millage does not produce the same number of dollars it did in previous years as a result of an erosion of the tax base. In many cities, industry is moving to other states or to the suburbs and the residential neighborhoods are declining, thereby producing lower property evaluation and generating fewer dollars per mill for the school district.

All of the above factors lead an increasing number of school districts to conclude that they must lay off teachers. These factors are so intertwined that a vicious circle is often created with reduced enrollment often leading to reduced state aid and financial problems. One school district attempted to combat reduced funding as a result of millage defeats and increased costs by placing the fifth and sixth grades on half-day sessions. As soon as this information became public, the parents of 180 fifth and sixth graders removed their children from the school system. This decreased the enrollment which in turn, decreased the state aid and thrust the school district into a worse financial position than before. On top of this, the district non-renewed a large number of teachers which led to the institution of a lawsuit by the local teacher association charging the board of education with an improper layoff.

Once the school district has concluded that it is necessary to terminate the services of teaching personnel, it is absolutely crucial that the teachers be laid off in strict compliance with the state tenure statutes and in conformity with the teachers' federally protected constitutional rights. With the pervasive shortage of teaching jobs, teachers' associations and their counsel will be examining every layoff, step-by-step, in search of legal grounds to attack the layoff and maintain the teachers' jobs. If the old adage "An ounce of prevention is worth a pound of cure" ever applied anywhere, this is where it would apply. School administrators must prepare their budgets as soon as possible and they must make hard decisions as to which teachers will, in fact, not be returning to their classrooms for the following school year. At least two school districts decided that instead of making a genuine attempt to determine how much money they would have the following school year and dispatching notices of layoff to those teachers whom they had reasonable and good cause to believe would, in fact, be laid off, they non-renewed their entire teaching staff. Both districts are currently involved in federal court actions.

With respect to layoffs, state tenure statutes are divided into several groups. In some states, the tenure law specifically provides for a decrease in enrollment or a justifiable decrease in the number of teaching positions as a legitimate reason for dismissal. Some of these states are Alabama, California, Colorado, Connecticut, Delaware, Hawaii, Kansas, Maine, Massachusettes, Michigan, Minnesota, Nevada, North Carolina, and Virginia.

Other tenure laws permit the "suspension" of a teachers' contract because of a decrease in enrollment. Four states having this type of statute are Kentucky, Ohio, Pennsylvania, and Rhode Island.

Missouri law authorizes school boards to place teachers on a leave of absence because of a decrease in enrollment, a reorganization of the schools, or financial conditions.

The tenure laws of Mississippi and Wyoming are silent as to dismissals for economic reasons, but list causes of misconduct such as incompetency, insubordination, and immoral conduct and add a phrase akin to "and for other good and just causes." A subgroup of this type of tenure law, similar to the Washington statute, provides for dismissal "for cause" or "for just cause" without specifically indicating the types of action that are encompassed by the term.

A final kind of tenure law merely states kinds of misconduct as grounds for dismissal without authorizing dismissal for economic reasons or for "good cause". Louisiana, Maryland, and Oklahoma are examples of states possessing this kind of law.

If the statute permits a reduction in force as a result of declining enrollment, the school district must produce evidence to support the existence of that specific condition.[1] For instance, in light of such specific statutory language, it is not permissible for the school district to dismiss a teacher simply in order to save money or to promote the efficient operation of the district.[2]

In Pennsylvania, it has been held that teachers can be dismissed as a result of a decrease in enrollment in a course, program, or department even if there has been an overall increase in the number of students in the school district. The Pennsylvania Supreme Court has held that the statutory language "substantial decrease in the number of students due to natural causes" refers to enrollment in a course, school, or school district. Therefore, a substantial enrollment decrease in a specific course of study could justify the termination of a tenured teacher's contract.[3] Furthermore, it has long been established in Pennsylvania that if a department is abolished for valid reasons, which could include economic reasons, the tenured teachers can be dismissed.[4] However, simply eliminating special classes, for example, classes in advanced mathematics as a result of a shortage of advanced mathematics students, may not be considered tantamount to eliminating a department or a course of study. Therefore, it is likely that tenured teachers instructing special classes will be afforded greater protection against nonrenewal than they would receive if the entire department were eliminated.[5]

Besides determining under what circumstances a layoff can occur, a particular state statute may contain provisions describing the procedures under which a reduction in force can be accomplished. The law in some states, such as California, Colorado, Massachusetts, New York, and Michigan, provides that no tenured teacher can be laid off and a non-tenured teacher retained, at least when the probationary teacher is retained to fill a position which the tenured teacher is certified, qualified, or competent to fill.[6] In fact, in the absence of a specific statute to the contrary, it has been frequently held that a tenured teacher can be dismissed because of a lack of need for his services only if

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1. Woods v. Board of Educ., 259 Ala. 559, 67 So.2d 840 (1953).

2. Lovelace v. Ingram, 518 P.2d 1102 (Okla. 1973); Bragg v. School Dist. of Swarthmore, 337 Pa. 363, 11 A.2d 152 (1940).

3. Jones v. Holes, 334 Pa. 538, 6 A.2d 102 (1939).

4. Ehret v. Kulpmont Borough Sch. Dist., 333 Pa. 518, 5 A.2d 188 (1939).

5. Board of Sch. Trustees v. O'Brien, 190 A.2d 23 (Del. 1963); Bragg v. Sch. Dist. of Swarthmore, 337 Pa. 363, 11 A.2d 152 (1940); Jones v. Kulpmont Borough Sch. Dist., 333 Pa. 581, 3 A.2d 914 (1939); Seidel v. Bd. of Educ., 164 A. 297 (N.J. 1933).

6. Marolt v. Independent Sch. Dist., 299 Minn. 134, 217 N.W.2d 212 (1974); Steeby v. Sch. Dist. of the City of Highland Park, 224 N.W.2d 97 (Mich. Ct. App. 1974).

there is no other position available he is capable of filling.[7]

The law in California goes beyond the simple distinction between tenured and probationary teachers and holds that seniority governs even among tenured teachers and that no teacher can be laid off for a reduction in force until all non-tenured teachers and tenured teachers with less seniority have been dismissed. Also, the New York Supreme Court, Appellate Division has held that a tenured teacher cannot be discharged if there is another teaching position in his tenure area which is vacant or filled by a teacher who is junior to him in seniority.[8]

In California, Section 44955 of the New Education Code, which became operative on April 30, 1977, allows for a reduction in force for reason of reduced enrollment but also describes the requirement of layoff by strict seniority. Section 44955 states in pertinent part:

> Whenever in any school year the average daily attendance in all of the schools of a district for the first six months in which school is in session shall have declined below the corresponding period of either of the previous two years, or whenever a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year, and when in the opinion of the governing board of said district it shall have become necessary by reason of either of such conditions to decrease the number of permanent employees in said district, the said governing board may terminate the services of not more than a corresponding percentage of the certificated employees of said district, permanent as well as probationary, at the close of the school year; provided, that the services of no permanent employee may be terminated under the provisions of this section while any probationary employees, or any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render.
>
> Notice of such termination of services either for a reduction in attendance or reduction or discontinuance of a particular kind of service to take effect not later than the beginning of the following school year, shall be given before the 15th of May . . . and services of such employees shall be terminated in the inverse of the order in which they were employed. . . .[9]

Therefore, in California, the statute specifically authorizes the termination of a tenured teacher's services because of a decline in enrollment, but such termination can only be accomplished if notice is provided and the layoff occurs according to strict seniority.

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[7] Swisher v. Darden, 59 N.M. 511, 187 P.2d 73 (1955); Streibert v. Board of Directors of Sch. Dist., 339 Pa. 119, 14 A.2d 303 (1940).

[8] Silver v. Board of Educ. of West Canada Valley Central Sch. Dist., 362 N.Y.S.2d 636 (App. Div. 1975).

[9] Cal. Educ. Code § 44955 (West 1976).

However, there is no law in most states governing the order of layoff among tenured teachers or among non-tenured teachers. With very few exceptions, notably California, unless there is a contractual provision governing the order of dismissal, there is no statutory requirement as to which tenured teachers are to be non-renewed and which are to be retained.[10] Of course, in those states which mandate that a probationary teacher cannot be retained to fill a position which a tenured teacher is certified, qualified, or competent to fill, the converse is also true. If there are probationary teachers teaching subjects for which no tenured teachers are certified or qualified, the probationary teachers may be retained. This situation has legally occurred with probationary teachers who hold various kinds of special education certification, trade certification and, in at least one instance, certification in Native American Studies.

Up to this point, state tenure law and its application to a reduction in force has been discussed. If an individual teacher or teachers' association alleges a violation under the state statute, recourse is generally to the state trial court or to a state tenure commission.[11] However, in addition to any purely state statutory claim, it has been held that in many jurisdictions, a tenured teacher has a constitutionally protected property interest in his right to continued employment which cannot be denied him in an arbitrary or capricious manner without due process, which in some states would include a hearing.[12] Therefore, the dismissal of a teacher for engaging in a constitutionally protected activity such as free speech,[13] the dismissal of a tenured teacher without providing the procedural safeguards mandated by the local tenure system,[14] or the wholesale layoff of tenured personnel arbitrarily or unreasonably[15] can result in a federal lawsuit based upon the Constitution itself or on one of the Civil Rights Statutes.[16] For example, as alluded to before, two school districts laid off their entire teaching staff when it was clear that under no circumstances would the financial position of either district require more than the dismissal of a small percentage of the tenured staff. Both of these layoffs produced lawsuits in federal court based upon the proposition that the dismissed tenured teachers had a right to continued employment arising from the state tenure statute and the dismissal of more tenured

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10. Williams v. Board of Educ., 263 Ala. 372, 82 So. 2d 549 (1955).

11. Boyce v. Board of Educ. of the Sch. Dist. of the City of Royal Oak, No. 27656, slip op. at 6 (Mich. Ct. App. July 6, 1977).

12. Harris v. Mechanicville Central Sch. Dist., Mechanicville, Saratoga County, 86 Misc.2d 144, 382 N.Y.S.2d 251 (Sup. Ct. 1976); Jerry v. Board of Educ. of City Sch. Dist. of City of Syracuse, 75 Misc.2d 461, 347 N.Y.S.2d 917 (Sup. Ct. 1973), *modified*, 354 N.Y.S.2d 745 (App. Div. 1974), *modified*, 35 N.Y.2d 534, (1974).

13. Pickering v. Board of Educ. of Township H.S. Dist. 205, 391 U.S. 563 (1968).

14. Bignall v. North Idaho College, 538 F.2d 243 (9th Cir. 1976).

15. Johnson v. Board of Regents of Univ. of Wis. System, 377 F. Supp. 227 (W.D. Wis. 1974).

16. *See, e.g.*, 42 U.S.C. § 1983 (1970).

teachers than, in fact, needed to be laid off violated the teachers' property interest in continued employment thereby depriving them of their rights under the Constitution and the Civil Rights Acts. One of these lawsuits was settled by means of a consent decree signed by the federal judge stating that the teachers do enjoy a property interest and the school district is enjoined from a mass layoff such as this in the future. The other suit is still pending.

Summarizing the foregoing discussion, several general points emerge. (1) Become familiar with your state tenure statutes or have access to competent legal counsel who specializes in that area of the law. In every state, a legitimate reduction in force is permitted and can be accomplished without litigation if the proper procedures are followed. (2) School administrators must keep abreast of their budgetary requirements. Although it is clear that a school district often does not know the extent of its government aid and other sources of income until almost the beginning of the school year, it is imperative that decisions to reduce staff be predicated upon well-reasoned estimates of enrollment and the financial position of the school district. (3) Do not overlook the commonsense approach. If the school administration believes that there will be a 300 student loss for the coming school year and there is a 30:1 student-teacher ratio and the statute permits reduction in force for this purpose, it is unlikely that the teachers' association will permit a layoff of fifty teachers without commencing litigation.

In some states, courts have ruled that the provisions of the tenure act do not apply to a dismissal for bona fide economic purposes.[17] In other jurisdictions, the tenure act may govern a reduction in force but it may not speak to the specific details of how the layoff is to be accomplished. Therefore, the negotiated contractual provisions dealing with layoff and recall are essential to the implementation of a reduction in force. Teachers' associations are aware of this situation and place a high priority on negotiated language dealing with layoff and recall in the collective bargaining agreements. Great care must be given to the contract language agreed upon since the contractual layoff procedure is often pivotal in determining how a reduction in force can be implemented.

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[17] Boyce v. School Dist. of the City of Royal Oak, No. 27656 slip op. at 6 (Mich. Ct. App. July 6, 1977).

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*Collectively Bargained Approaches to Declining School Enrollment**

Stephen M. Nassau
Attorney at Law
Nassau, Beer, Boltz and Bennia
Washington, D.C.

By the 1983 academic year, it is predicted that public school enrollment will have declined by about ten percent from the level it was at ten years earlier. During this same period, the pool of available teachers has been increasing. Some refer to this as a period of teacher surplus; others as one of "teacher underutilization." The latter phrase, coined by the NEA, points up one of the dilemmas of the situation. With declining enrollments, ideally there should come the opportunity sought by most educators—the reduction in the number of pupils who must be taught by one teacher resulting in better working conditions for teachers and better education for students. The benefits of this situation can hardly be disputed but then we are confronted with reality in the form of economics and budgets.

In most states, fewer pupils in a local school system means less money from the state since state aid is usually computed on a per-pupil basis. Fewer pupils also means fewer citizens with a direct interest in the public schools and less support for adequate funding. Thus, the crunch. Declining enrollments have meant lower revenues and the need to reduce expenditures. This, in turn, has caused school closings and consolidations and the transfer, suspension or layoff of teachers and other school personnel.

The phenomenon of the economic difficulties of the employer being brought home to rest on his employees is rather old hat in many parts of the private sector where economic forces traditionally have caused periodic fluctuations in the size of the work force. Layoffs and recalls have become routine in areas such as the automobile industry, though the trauma of being forced out of work can never become routine. In the

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public sector, however, this is a rather new phenomenon. For teachers it is particularly difficult since their employment cycle is usually on a yearly, rather than on a weekly or monthly, basis and the skill of a teacher is often not easily transferrable to other areas of employment.

State tenure laws and other statutes usually provide little protection for teachers or guidance for school administrators who must deal with staff adjustments necessitated by declining enrollment or other financial exigencies. School boards are generally regarded as having the authority to lay off teachers for economic reasons regardless of whether or not this authority is expressly granted in the tenure statute. In some jurisdictions, the notice requirement and other procedural protections guaranteed to tenured teachers in disciplinary cases are unavailable to teachers who are being laid off. Even where the tenure statutes are applicable, they typically do little to provide any degree of certainty or clarity with regard to the procedures and rights involved in a layoff and, of course, nontenured faculty members have even less protection in these situations.

This broad gap in the law regarding the standards and procedures for layoffs causes uncertainty and disruption for everyone involved—school administrators as well as teachers. The inevitable upheavals caused by the economic difficulties surrounding declining enrollments can be lessened by dealing with the subject in the collective bargaining arena. In this forum, the views of administrators and teachers can be presented so that the resulting policy will reflect the input of those most directly affected.

THE RESPONSES TO DECLINING ENROLLMENTS AS A SUBJECT OF BARGAINING

In the private sector, job security provisions, such as no-subcontracting or no-layoff provisions, are considered mandatory subjects of bargaining unless they impinge on fundamental managerial prerogatives, such as a decision to go out of business entirely.[1] Even when a managerial decision is not a required subject of bargaining, a private employer must bargain about the impact of such a decision on his employees.[2]

In the public sector, largely because of notions of governmental sovereignty and unlawful delegation of power, there has been considerably more protection of management's rights and many items which would clearly be mandatory subjects of bargaining for a private employer may not be mandatory for a public employer. In determining whether an item is bargainable, a number of state courts have recently utilized a balancing test. Thus, in *PLRB v. State College Area School District,*[3] the

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[1] *See* Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, (1964); Ozark Trailers, Inc., 63 L.R.R.M. 1264 (1966).

[2] *See* General Motors, 77 L.R.R.M. 1537 (1971), *enforced*, 470 F.2d 422, (D.C. Cir. 1972).

[3] 337 A.2d 262 (Pa. 1975).

Pennsylvania Supreme Court stated that the issue should be decided by determining whether the impact of the matter on wages, hours, and terms and conditions of employment outweighs its probable effect on the basic policy of the educational system as a whole. In other words, will the item in dispute have a greater effect on the employees or on the employer?

The issue of job security in the public sector is relatively new and there are few cases dealing with the issue of whether it is or is not a mandatory subject of bargaining. In another Pennsylvania case, the Commonwealth Court found that the decision to lay off employees was a matter of inherent managerial policy and, hence, was only a permissive, rather than a mandatory, bargaining subject.[4] However, in *Rylke v. Portage Area School District*,[5] the Pennsylvania Supreme Court held that the suspension of teachers for economic reasons was arbitrable under the provisions of the contract.

The 1975 financial crisis in New York produced a number of cases on the issue of the negotiability of job security agreements. In several of these cases, it was decided that the basic determination regarding the size of the work force and the abolition of positions is not a mandatory subject of collective bargaining.[6] However, as in the private sector, it was further held that the employer was required to negotiate regarding the impact of the decision on the employees.[7] Notwithstanding the fact that the New York courts and labor board have found that a public employer cannot be *required* to bargain regarding the size of the work force and the decision to lay off employees, the state's highest court has held that such matters are permissive subjects of bargaining which, if contained in a collective agreement, are enforceable through contractual procedures including binding arbitration.[8] Despite the much discussed distinctions between mandatory and permissive subjects, however, there are some authorities who view this as only an exercise in semantics:

> As a practical matter, however, sophisticated negotiators do not worry very much about whether a given proposal is "mandatory" or "permissive." If a union wants something in the "permissive" area badly enough, it will trade off something in the "mandatory" area (or vice versa). In effect, the categories into

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[4] PLRB v. Mars Area Sch. Dist, 344 A.2d 284 (Pa. Commw. Ct. 1975).

[5] 375 A.2d 692 (Pa. 1977).

[6] *See* Schwab v. Bowen, 363 N.Y.S.2d 434 (Sup. Ct. 1975), *aff'd* 379 N.Y.S.2d 111 (App. Div. 1976); Vizzini v. Beame, 90L.R.R.M. 2385 (N.Y. Sup. Ct. 1975); Burke v. Bowen, 373 N.Y.S.2d 387 (Sup. Ct. 1975).

[7] Port Washington Union Free Sch. Dist. and Port Washington Teachers Ass., PERB Case No. U-1288, (Aug. 1, 1975), 630 GERRB-12; *In re* City of N.Y. and AFSCME Dist. Council 37, (N.Y.C.O.C.B., July 16, 1975), 625 GERRB-11; City of N.Y. v. Board of Collective Bargaining, 92L.R.R.M. 2784 (N.Y. Sup. Ct. 1976).

[8] Board of Educ., Yonkers City Sch. Dist. v. Yonkers Fed. of Teachers, 40 N.Y.2d 268, (1976), *see also* Board of Educ. of the Levittown Union Free Sch. Dist. v. Levittown United Teachers, 386 N.Y.S.2d 440 (App. Div. 1976).

> which the NLRB has divided the subject matter of collective bargaining are somewhat artificial. What really counts is bargaining power. If, as a practical matter, an employee organization has no bargaining power, nothing is negotiable. Conversely, if it has enough power, everything is negotiable.[9]

Another problem in the area of negotiability arises when there is an existing tenure or other statute which deals with teacher dismissals. In some states, such statutes have been held inapplicable to layoff situations.[10] In others, however, statutory coverage of a subject matter has been held to preempt the subject from the bargaining arena. Thus, in *Teamsters Local 320 v. Minneapolis*,[11] the Minnesota Supreme Court held that a provision in the city's home rule charter providing for employee suspensions precluded any collective bargaining with respect to that matter. Other state courts have ruled that a matter within the purview of the scope of a bargaining statute is bargainable notwithstanding the fact that the matter might be dealt with in another statute, unless the latter expressly prohibits dealing with it at the bargaining table.[12] As stated by the New York State Court of Appeals in the *Huntington* case:

> Public employers must be presumed to possess the broad powers needed to negotiate with employees as to all terms and conditions of employment . . . "[I]n the absence of an express legislative restriction against bargaining for that term of an employment contract between a public employer and its employees, the authority to provide for such [term] resides in the [school board] under the broad powers and duties delegated by the statutes."[13]

Under this type of ruling, the existence of an applicable tenure statute would not prevent bargaining about layoffs, provided that no agreement contrary to the statute could be reached.

Assuming the result does not conflict with any existing law, the use of the negotiating process—whether it be deemed mandatory or permissive—to deal with the effects of enrollment declines should improve morale, lessen apprehension and ease the disruption and trauma of this difficult situation. In the sections that follow, it is assumed that both parties are willing to deal with the matter at the bargaining table and the types of items which could be included in the agreement will be discussed.

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[9] Wollett & Chanin, *The Law and Practice of Teacher Negotiations*, 6:51 N. 180 (BNA 1974).

[10] Boyce v. Board of Educ. of the Sch. Dist. of Royal Oak, No. 27656, slip op. at 6 (Mich. Ct. App. July 6, 1977).

[11] 88 L.R.R.M. 2415 (Minn. 1975).

[12] *See* Board of Educ. of Union Free Sch. Dist. No. 3 of the Town of Huntington v. Associated Teachers of Huntington, Inc., 30 N.Y.2d 122 (1972); Philadelphia Bd. of Educ. v. Philadelphia Federation of Teachers, Local No. 3, 346 A.2d 35 (Pa. 1975).

[13] Board of Educ. of Union Free Sch. Dist. No. 3 of the Town of Huntington v. Associated Teachers of Huntington, Inc., 30 N.Y.2d 122, 130 (1972).

COLLECTIVE BARGAINING PROVISIONS TO DEAL WITH THE EFFECTS OF DECLINING ENROLLMENTS

Limits on Right of the Employer to Lay Off Employees

Obviously, the best protection that an employee organization can obtain to deal with the situation of declining enrollments would be an absolute ban on any reduction in force or, at least, some precise limits to such actions. The absolute ban is rare due to the current economic situation and continuing strong notions regarding public employer managerial prerogatives. Nevertheless, where the contract term is short and the financial picture is reasonably predictable, there is no reason why a school board should not be able to agree to a flat prohibition. The benefits in employee morale might more than offset any temporary restrictions on the employer's power. Realistically, however, it is not anticipated that there will be many such clauses entered into in the public sector in the next few years.

Many state laws are silent or vague concerning the circumstances which would justify a reduction in force. The collective bargaining agreement can provide guidelines which would be beneficial to all involved and which could serve to prevent unnecessary disputes and litigation regarding the justification for the action. Traumatic as a reduction in force might be to those affected, the situation would be more acceptable if the circumstances permitting its imposition had been spelled out in advance.

Great specificity in stating the permissible bases for a layoff in a collective bargaining agreement is probably not feasible, but some delineation of the general circumstances would be desirable. Thus, the agreement might specify that layoffs can occur only if required by a substantial reduction in available funds. The definition of "substantial" might need to await later determination or a minimum percentage or dollar amount might be inserted for greater certainty. The NEA has recommended that any such clause also specify that the layoffs can only take place if the loss of funds cannot be avoided by the exercise of the board's fiscal powers or offset by the reduction of expenses for items other than personnel. In any event, the clause should probably specify that the number of teachers who will be laid off will bear a reasonable relationship to the amount of funds lost by the school district. With such limitations, teachers need not fear that more of them will lose jobs than is absolutely necessary.

Another possible contractual justification for a reduction in force could be a decline in pupil enrollment which brings about a substantial reduction in funds or which results in a reduction of the teacher-pupil ratio to less than a defined level. These latter provisions are important because the mere fact that a school system has less pupils than it had in prior years should not, by itself, be considered sufficient justification for dismissing teachers from their jobs. As a result of the particular state pattern of funding or because of other economic factors, such as increased tax revenues or federal assistance, the school system may, in fact, be suffering no great financial hardship. In such circumstances, declining enrollment should be seized upon as an opportunity to lower the teacher-pupil ratio and to improve the quality of educational services rather than an opportunity to dismiss some teachers. Obviously, however, at some point, there will be a level beyond which both teachers and administrators can agree that no further class size reductions are necessary or desirable, and at that point, perhaps, layoffs can occur.

Due to declining enrollments, school administrators may find that particular areas of instruction or educational services are being underutilized and the need for the teachers working in such areas or services has decreased, or school systems may find it desirable to consolidate to cut costs and to obtain more efficient utilization of physical facilities. This, and other bona fide situations, also might be included in a list of justifications for layoffs in a negotiated agreement. The point is that by spelling out the circumstances in advance, through joint participation in the negotiations process, the upheaval can be minimized.

Notice and Negotiations Regarding Layoffs

Negotiated layoff procedures generally provide that the first notice of the intent to lay off employees be sent to the bargaining representative. The organization would then have the opportunity to request negotiations regarding the implementation and impact of the proposed layoffs and it may also have the negotiated right to discuss the justification for the action and possible alternatives thereto. Typically, the notice must contain the reasons for the proposed layoff and provide the employee organization with accessibility to all relevant information and data.

One of the big problems in this area occurs at the time of year when a school board must, by law, provide teachers with notices of nonrenewal or dismissal but it is not yet sure of its financial situation for the coming year. In states, unlike Michigan,[14] where the tenure statutes have been deemed to apply to economic dismissals, boards have often sent dismissal or nonrenewal notices to all teachers in the district, or to large numbers of them, and then rescinded the notices after the financial situation became more clear. The problems caused by such a procedure are obvious. Teachers suffer the uncertainty of not knowing their situation for the following year and school systems may lose some of their best personnel who decide not to wait around to see what will happen. The question raised by this procedure is whether the teachers and the bargaining agent can agree in the negotiated contract to a notice period which is shorter than that provided by statute. Since the statutory provision is a procedural one designed to protect the teachers, it could be argued that the teachers' organization has a right to waive the protection. On the other hand, this would constitute the negotiation of an item in conflict with a statute, an item usually outside of the bargaining area. Perhaps the problem could be eased by specifying in the agreement that the statutory notice will be deemed merely pro forma with the board agreeing not to lay anyone off who does not receive a second notice at a specified time.

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[14] *See* Boyce v. Board of Educ. of the Sch. Dist. of Royal Oak, No. 27656, slip op. at 6 (Mich. Ct. App. July 6, 1977).

Selection of Those to be Laid Off

One of the most disruptive aspects of the declining enrollment phenomenon is the uncertainty which surrounds the question of which teachers will be the ones to be laid off. Most tenure statutes are silent on the subject or merely state that nontenured faculty will be dismissed before tenured faculty. Even when state law determines that seniority shall prevail, there are many gaps in the understanding of how the system should operate.

The collective bargaining agreement provides an ideal instrument in which to fill in these gaps and set forth mutually agreed upon rules for the implementation of a layoff. Typically, seniority is used as the standard but, often, other factors, such as prior academic achievement or overall teaching experience, are also considered. Seniority can be measured either by years of service in a building, or in a position, department or school system. Where system-wide seniority is used, there may be problems in providing the necessary educational services, since the teachers who remain may not have the skills required to fill the vacant positions. This may be remedied by conditioning the layoff of the junior teachers on the ability of the remaining teachers to perform the necessary tasks. Alternatively, seniority could be based on years in a position, which would assure that the required positions would be adequately staffed. However, this might be unfair to a senior teacher whose position is eliminated. A remedy in this situation would be to allow the laid-off senior teacher to "bump" into other positions which he or she is qualified or certified to fill. There are a myriad of variables and considerations in this area. It is most important that a procedure be developed and agreed upon before the actual event occurs. To do otherwise is to invite chaos and trouble.

Other matters that can be dealt with in the agreement include procedures to follow when two or more teachers have identical seniority; whether or not employee organization officers should receive "superseniority;" and procedures for allocating seniority credit for time spent on leaves or during a break in service.

Status of Laid Off Teachers

The agreement should also specify the recall rights of laid off teachers detailing, among other things, how long they can remain on a recall list, whether they are required to return to any job or only to their former position or one substantially equvalent to it, and whether they continue to accrue seniority credits while on lay-off status. The agreement might also set forth the teachers' rights to participate in fringe benefit plans and retraining programs which are designed to prepare them for other positions in the system. Restrictions on hiring other teachers while some teachers are laid off would not be inappropriate and the agreement could require that all laid off teachers be offered any substitute teacher employment that is available.

AFFIRMATIVE ACTION CONSIDERATIONS

Affirmative action considerations will frequently come into play when an employer finds that layoffs must be made because of declining enrollment and its resultant budgetary problems. In a typical situation, the employer will find that a disproportionate number of those being laid off are minorities with the least seniority. In such circumstances, the employer may be faced with a legal action filed by a minority employee alleging discrimination because of the disproportionate impact of the layoffs on minority employees in comparison to non-minority employees.

In *Teamsters v. United States*, the Supreme Court ruled that seniority systems which may lock minorities into lower positions as a result of past discrimination, which occurred prior to the effective date of Title VII of the Civil Rights Act (*i.e.*, 1965), are immune from attack. The Court concluded that a bona fide seniority system does not become unlawful simply because it may perpetuate pre-Title VII discrimination. Likewise, in *United Airlines v. Evans,*[16] the Supreme Court held that a seniority system which perpetuated the effects of a discriminatory discharge was valid because the complaining party had failed to file a timely charge challenging the post-Act discrimination. Thus, it is apparent that without a timely charge, post-Act discrimination is comparable to pre-Act discrimination.

From the aforementioned cases, it seems reasonable to conclude that a bona fide seniority or merit system which perpetgates the effect of pre-Act discrimination is valid. Thus, an employer, without a history of post-Act discrimination, even if guilty of pre-Act discrimination, may within the confines of the law when making layoffs which have a disproportinate impact upon minorities.

However, a more difficult issue arises when evidence can be presented showing that the employer has engaged in post-Act discrimination which accounts for the disproportionate number of minorities with low seniority. At present, there have been no decisions interpreting the effect of the

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[15] 14 Fair Empl. Prac. Cas. 1514 (U.S. 1977).

[16] *Id.* at 1510.

Teamsters and *United Airline* cases on the layoff situation which occurs in the context of post-Act discrimination.

Most of the appellate rulings on the layoff issue in the Title VII context, prior to the *Teamsters* and *United Airline* cases, held that in the absence of the ability of the minority employee threatened with layoff to demonstrate that he or she was the victim of past discrimination, a "last hired first fired" policy did not violate Title VII or the Civil Rights Act of 1866.[17]

However, it must be kept in mind that the Supreme Court in *Franks v. Bowman Transportation Co., Inc.*,[18] clearly indicated that Section 703 (h) of Title VII, which permits bona fide seniority or merit systems, is no bar to a claim for retroactive or constructive seniority by actual victims of post-Title VII (post-1965) discrimination. Thus, it would appear that an employer's seniority system which results in a disproportionate layoff of minorities is valid only to the extent that it does not perpetuate the effects of discrimination occurring after the effective date of Title VII; and further, any minority employee who can demonstrate that discrimination occurred after the effective date of the Act would have a claim for constructive seniority which would be compared to non-minority members' seniority for purposes of layoff.

Additionally, employers and associations wishing to address themselves to future layoff situations which may compound the effects of discrimination occurring after the effective date of Title VII may obviate legal complications by negotiating a layoff provision which allows for constructive seniority, or, in the alternative, they may provide for the layoff of minorities only in proportion to the composition of the employer's labor force prior to the layoffs. To date, there has been no litigation challenging a layoff provision which seeks to protect the achievements of affirmative action. It is likely that such a provision would withstand attack in the courts when post-Act discrimination can be demonstrated and when it is clear, on the face of the contract language, that the purpose of the provision is to remedy the effects of post-Act discrimination. Whether such a system would be upheld when there is no history of prior discrimination or when the discrimination occurred prior to 1965 is not clear. Of course, the Supreme Court's decision in the *Bakke* case[19] will have an impact on this issue.

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[17] *See* Chance v. Board of Examiners, 11 Fair Empl. Prac. Cas. 1450 (2d Cir. 1976); Jersey Central Power & Light v. IBW Local Unions, 9 Fair Empl. Prac. Cas. 117, *vacated and remanded*, 13 Fair Empl. Prac. Cas. 762 (U.S. 1975); Watkins v. Steelworkers, Local 2369, 10 Fair Empl. Prac. Cas. 1297 (5th Cir. 1975); Waters v. Wisconsin Steelworks, 8 Fair Empl. Prac. Cas. 577 (7th Cir. 1974).

[18] 424 U.S. 747 (1976).

[19] Bakke v. Regents of Univ. of Cal., 553 P.2d 1152 (Cal. 1976), *Cert. granted*, 45 U.S.L.W. 3570 (U.S. Feb. 22, 1977) (No. 76-811).

ALTERNATIVES TO LAYOFFS

One possible method to avert layoffs through the collective bargaining process would be to coordinate the bargaining of several school districts with varying enrollment patterns. Through agreement, a system could be established whereby teachers in a district with declining enrollment would be given preferential treatment by a district with increasing enrollment. Obviously, this device would be of no value when all of the neighboring systems are losing population.

Of course, financial savings can be obtained through payment or benefit reductions. Most employee organizations would find this an unacceptable alternative to a layoff since it would affect all, rather than a few, employees and the lower wages and benefits would continue into future years.

Work sharing, whereby two or more employees occupy a single full-time position, may be considered. However, it may be difficult to adapt this device to the educational setting.

One possibility is to encourage the early retirement of older teachers by sweetening the retirement package. While this will mean increased retirement costs to the system, the savings in salaries may allow more teachers to remain employed. Similarly, allowing more teachers to take sabbatical leaves at less than full pay would ease the district's total cost burden and permit more teachers to keep their jobs.

CONCLUSION

There are no easy answers to the economic difficulties facing our nation's schools as a result of smaller student bodies in combination with other factors. Although everything possible should be done to avoid laying off teachers, some layoffs are inevitable. Through the collective bargaining process, though, the difficulties can be eased and teachers can be given the assurance that they will be treated fairly in accordance with rules established jointly by their representatives and the school board. This assurance should have a salutary effect on teachers, school boards and the educational system.

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Search and Seizure in Higher Education

Eric S. Mondschein
Regional Supervisor
Massachusetts Department of Education
Bureau of Student Services

Michael A. West
Assistant to the Chancellor
University of Massachusetts

INTRODUCTION

Courts have recognized a college's right to maintain order and discipline on campus for the purpose of ensuring the proper functioning of the educational institution. The United States Supreme Court has also recognized that students do not shed their constitutional rights when they enter public colleges and universities. This apparent conflict, the rights of students versus the rights of educational institution, has been a controversial issue in higher education for the last one hundred years. The basic questions still remain: how much control does a college have over its students; and, conversely, what rights and freedoms should a student expect while attending a college or university?

The purpose of this paper is to address the fourth amendment as it applies to the student-college relationship. While the United States Supreme Court has not ruled directly in this area, there are a number of key federal and state court decisions that provide direction and trends for college administrators to consider. As we shall see, the law regarding search and seizure, as it relates to higher education, is still evolving.

BACKGROUND

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[1]

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1. U.S. Const. amend. IV.

Originally, the Bill of Rights proscribed only federal action. However, the fourteenth amendment to the United States Constitution has been interpreted by the U.S. Supreme Court to bring the actions of the individual states within the purview of the Bill of Rights.[2]

In *Mapp v. Ohio*,[3] the Supreme Court declared that the first ten amendments to the U.S. Constitution, including the right to privacy, were enforceable against the states through the "due process" clause of the fourteenth amendment. The Justices said, "We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by the same authority, inadmissible in a state court."[4]

While the fourth amendment protects persons against unreasonable searches and seizures, it does not prohibit all searches and seizures. What is considered an unreasonable search? What fourth amendment rights do students have in a college setting?

In order to determine what is considered a reasonable search, it is necessary to explore recent court decisions which delineate the rights of a college or university to search, and the rights of students to be free from unreasonable searches and seizures.

WARRANTLESS SEARCHES

In *Moore v. Student Affairs Committee of Troy State University*,[5] a federal district court found that when a public university has a reasonable cause to believe that a student is using a residence hall room for an illegal purpose, or a purpose which violates reasonable rules and regulations of the institution, school officials may conduct a search of the student's room without first obtaining a search warrant. The court stated that "a reasonable right of inspection is necessary to the institution's performance . . . (as an educational facility) even though it may infringe on the outer boundaries of a dormitory student's fourth amendment rights."[6] The court also stated,

> This standard of "reasonable cause to believe" to justify a search by college administrators . . . is lower than the constitutionally protected criminal law standard of "probable cause." This is true because of the special necessities of the student-college relationship and because college disciplinary proceedings are not criminal proceedings in the constitutional sense.[7]

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[2] U.S. Const. amend. XIV, § 1.: "No State shall . . . deprive any person of life, liberty or property without due process of law . . ."

[3] 367 U.S. 643 (1961).

[4] *Id.* at 655.

[5] 284 F. Supp. 725 (M.D.Ala. 1968).

[6] *Id.* at 730.

[7] *Id.* at 730.

It must be noted that even though illegal drugs were found in the student's room, only on-campus disciplinary procedures were implemented.

In a similar case, *Keene v. Rogers*,[8] Maritime Academy officials conducted a search of a student's car because they had reasonable cause to believe that the student had desecrated an American flag, an act which is in violation of the Academy's rules and regulations. Upon searching the automobile, school officials found a small amount of marijuana. The possession of this drug also violated the Academy rules. Following a hearing, the student was dismissed. In upholding the dismissal, the court held that "the search of plaintiff's automobile was a reasonable exercise of the academy's supervisory authority to maintain order and discipline among the cadets, and therefore did not infringe plaintiff's Fourth Amendment rights."[9]

In both of the above cases, the courts allowed the search because it was aimed at upholding discipline and furthering the educational function of the college.

In *Smyth v. Lubbers* and *Morale v. Grigel*,[11] cases involving searches for illegal drugs and stolen property respectively, the courts again limited warrantless searches to those that furthered the college's function as an educational institution. However, in *Smyth*, the court said, "While the college has an important interest in enforcing drug laws and regulations, and a duty to do so, it does not have such special characteristics or such a compelling interest as to justify setting aside the usual rights of privacy enjoyed by adults."[12] In *Morale*, the court noted,

> The presence or absence of stealing on a campus does not disrupt or disturb the operation of its academic functions. The only interest to which the Institute could point to justify the search was to shelter its students from the criminal law enforcement authorities. Commendable or not, this is not an interest which justifies an infringement of constitutional liberties.[13]

These two courts, therefore, were limiting warrantless searches to administrative situations in which college officials have a legitimate reason for protecting the college's interests, such as inspections for health and safety reasons, maintenance, damage, or inventory.

Warrantless searches are also allowable under three other circumstances: (1) if consent is given for the search; (2) if the search is incident to a lawful arrest; and (3) if an emergency situation exists.

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[8] 316 F. Supp. 217 (D. Me. 1970).
[9] *Id.* at 222.
[10] 398 F. Supp. 777 (W.D. Mich. 1975).
[11] 422 F. Supp. 988 (D.N.H. 1976).
[12] Smyth v. Lubbers, 398 F. Supp. 777, 790 (W.D. Mich. 1975).
[13] Morale v. Grigel, 422 F. Supp. 988, 996 (D.N.H. 1976).

Fourth amendment rights can be waived if consent is freely and intelligently given, and if such consent is free from intimidation and/or duress.[14] At least one federal court has indicated that it would not accept the argument that a blanket consent is given by the student when he/she signs a room contract "[E]ven if the contractual provision which . . . (he) signed includes extensive searches for stolen property, the school certainly cannot condition attendance at . . . (the College) upon waiver of constitutional rights."[15]

A search of a student's room or person is justified if it is incident to a lawful arrest. However, officials cannot search for illegal materials first and then make an arrest, thereby justifying the search. "The principle is perfectly clear: A search cannot be justified on the basis that it uncovered facts which gave rise to probable cause for arresting a person and then by a process of induction, to suggest that the search is justified becaue it is an incident to an arrest."[16]

A search without a warrant demands exceptional circumstances. Unless college officials are responding to a genuine emergency, or unless law enforcement personnel believe that the situation warrants immediate action (*i.e.*, there is no time to obtain a warrant), a warrantless search is unreasonable.

DELEGATION OF AUTHORITY

In *Piazzola v. Watkins*,[17] the United States Court of Appeals for the Fifth Circuit found that when university officials allowed state narcotics agents to assist them in a search of student's residence hall rooms when there was no warrant issued and the search eventually led to the arrest and conviction of the students, the search was in violation of the fourth amendment. The court stated that

> A student who occupies a college dormitory room enjoys the protection of the Fourth Amendment. True, the University retains broad supervisory powers which permit it to adopt the regulation . . . (allowing college officials to search students' dormitory rooms) provided that regulation is reasonably construed and limited in its application to further the University's function as an educational institution. The regulation cannot be construed or applied so as to give consent to a serach for evidence for the primary purpose of a criminal prosecution. Otherwise, the regulation itself would constitute an uncontitutional attempt to require a student to waive his protection from

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[14] State v. Wingerd, 318 N.E. 2d 866 (Ohio Ct. App. 1974).

[15] Morale v. Grigel, 422 F. Supp. 988, 999 (D. N.H. 1976).

[16] People v. Cohen, 292 N.Y.S. 2d 706, 711 (Dist. Ct. 1968).

[17] 442 F. 2d 284 (5th Cir. 1971).

> unreasonable searches and seizures as a condition to this occupancy of a college dormitory room.[18]

Thus, university officials cannot share their authority with the police or delegate their authority to the police. If the university reserves the right to inspect a student's room for a limited number of purposes (*i.e.*, health, safety, inventory of furnishings, etc.), this right cannot be transferred to law enforcement officials for the same purpose or for other reasons permitting the policy to search a room without a warrant. Even if consent to search a room is given to college officials, those officials cannot fragmentize, share, or delegate it.[19]

NOTICE OF IDENTITY AND PURPOSE

A Pennsylvania court held, in *Commonwealth v. McCloskey*,[20] that even though university officials and state policy were armed with a search warrant, the search they conducted of a student's room was in violation of the fourth amendment because they failed to announce their identity or purpose to the occupants of the room.

The law enforcement officials entered the student's room with a pass key, without knocking or announcing who they were or why they were there. The court recognized the sensitive nature of the case and acknowledged that the search did uncover illegal conduct. However, the court declared,

> An application of the governing rules of law constrains us to hold it was the result of an improper search. The fourth amendment prohibition against unreasonable search and seizure requires that before a policy official enters private premises to conduct a search . . . he must give notice of his identity and purpose, excpet when exigent circumstances justify the failure to give notice.[21]

The court explained that in this case there was no evidence of exigent circumstances to justify entering the student's room without an announcement of identity and purpose. The court noted that the room was located on the third floor and there was no other exit into the hallway where the policy were standing.

SCOPE OF A SEARCH WARRANT

In *City of Athens v. Wolf*,[22] the court delineated the scope of a search conducted by policy in a college residence hall.

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[18] *Id.* at 289.
[19] People v. Cohen, 292 N.Y.S.2d 706, 709 (Dist. Ct. 1968).
[20] 272 A. 2d 271 (Pa. Super. Ct. 1970).
[21] *Id.* at 275.
[22] 313 N.E. 2d 405 (Ohio 1974).

City Police entered room 318 of an Ohio University residence hall with a warrant to search for drugs. Drugs and equipment were seized and the inhabitants were arrested.

During the search, one officer was told to search the bathroom, which was connected to another residence hall room. In doing so, the officer noticed that the door to the adjoining room was open. He walked through the door into the next residence hall room and noticed a student attempting to conceal something behind his back. Fearing it to be a weapon, the officer ordered the student to drop the object and move away. The student acquiesced and the officer discovered the object to be a pipe containing hashish. The student was arrested for possession of drugs and convicted.

On appeal, the student maintained that the evidence had been seized during an illegal search. The Supreme Court of Ohio agreed and explained that although the police had conducted a proper search of room 318, their search warrant gave them no authority to enter the adjacent room. The fact that the door from the shared bathroom was open did not constitute an invitation to the general public to enter.

The police maintained that the seizure of the pipe and hashish was reasonable under the "plain view" doctrine. The court rejected this argument noting that while the evidence was in plain view, the police officer had no right to be in the student's room in the first place.

The court concluded by explaining that "since room 317 is a separate and independent room whose occupants are completely unrelated to those in room 318, absent some perceived and tangible threat emanating from 317, an officer's general fear of the unknown is objectively insufficient to justify intrusion."[23]

This case demonstrates the more stringent requirements the courts place upon law enforcement officials when conducting a search for the purposes of acquiring evidence to be used in a criminal proceeding.

INVENTORY SEARCHES

In the case of *State v. Johnson,*[24] a junior college student left her pocketbook in a classroom. A custodian found the purse and turned it over to the school's security office. A security officer opened the purse and found a wallet which contained the student's identification. Searching further, the officer found illegal pills inside a small pocket. When the student came to claim the pocketbook, she was arrested and subsequently convicted for the unlawful possession of a dangerous drug. In appealing her conviction, the student maintained that the security officer had conducted an illegal search of her pocketbook when he continued to search after he had found her identification.

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[23] *Id.* at 410.
[24] 530 P.2d 910 (Ariz. Ct. App. 1975).

The court upheld the conviction and explained that in order for an inventory search to be valid, two essential requirements must be met: "First, the police must have lawful custody; and second, the police must have acted in good faith in conducting the inventory so as not to use it as a subterfuge for a warrantless search."[25]

The court noted that the police had legitimate possession of the purse; it had been turned over to them as lost property. In order to determine its rightful owner, the police had to search its contents. After determining the rightful owner, it was reasonable and necessary for the police to inventory all items contained in the purse for the purpose of safeguarding any valuables.

PLAIN VIEW

In 1976 in the case of *State v. Kappes*,[26] an Arizona Court of Appeals held that when college officials are conducting a valid inspection of residence hall rooms and illegal substances are discovered in plain sight, they are not engaging in an unreasonable search and seizure by turning over the illegal materials to law enforcement officials for criminal proceedings.

The university had a regulation that required university officials to make monthly inspections of dormitory rooms to check on cleanliness and safety conditions and to determine if repairs or maintenance were needed. Twenty-four hour notice of each inspection was always posted.

During an inspection, college officials entered a room and saw a pipe and marijuana butts out in the open on a desk. They notified the campus security officials, who, upon arrival at the room, placed the student under arrest. The student was subsequently convicted of possession of illegal drugs. She appealed claiming that her fourth amendment rights had been violated.

The court of appeals upheld the conviction, noting that the university officials were legally in the student's room when they discovered the evidence in plain view. Relying on the Supreme Court decision in *Ker v. California*,[27] the court stated that "it has long been settled that objects falling in the plain view of an officer who has the right to be in a position to have that view are subject to seizure and may be introduced into evidence."[28]

PRIVATE COLLEGES

It has been well established that students who attend public colleges and univiersities are entitled to the protections guaranteed by the United States Constitution. However, students attending private institutions do not enjoy the same safeguards. Actions taken by private colleges have been determined to be actions of private persons and, thus not subject to the prohibitions of the Constitution.[29]

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[25] *Id.* at 915.
[26] 550 P.2d 121 (Ariz. Ct. App. 1976).
[27] 374 U.S. 23 (1963).
[28] *Id.* at 27.

The fourth amendment prohibits the federal and state governments from conducting unreasonable searches and seizures but private colleges are not considered governmental units and, thus, are not bound by the restraints of the fourth amendment.

In *People v. Boettner and Gottshall*,[30] a New York court held that when private college officials acted independently of police, and without police knowledge, the search of a student's dormitory room and the subsequent seizure of criminal evidence was not a violation of the fourth amendment.

In holding that the evidence seized was admissible in criminal proceedings, the court stated,

> While it is true that a student does not lose his constitutional rights at the schoolhouse door or at the entrance to the college campus, neither does he become cloaked with greater protection than any non-student who is the subject of a seizure of evidence by a private citizen.[31]

It should be noted that the court indicated quite emphatically that had the police participated in the search, or had they requested the search, a warrant would have been required.

Although students enrolled at private colleges are not safeguarded by the fourth amendment from purely private action, a private college does not have a license to search the person or rooms of its students at any time. Students living in a private college dormitory are still entitled to more than a "modicum of privacy." Just as a tenant is free from unreasonable intrusions by a landlord, so too is a student free from unreasonable intrusions by private college officials. While private colleges have the authority to insure that college rules and regulations are being followed, they may not harass or intrude upon their students' privacy at any time during the day or night, except in the case of an emergency.

Private colleges that receive considerable financial aid or other support from the state and federal governments may find themselves having to adhere to fourth amendment requirements. Although very few courts have found "state action" in situations where private colleges receive substantial private aid, there are a number of legal scholars who have made strong appeals for such a finding.[32]

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[29] *See, e.g.*, Browns v. Mitchell, 409 F.2d 593 (10th Cir. 1969); and Powe v. Miles, 407 F.2d 73 (2nd Cir. 1968).

[30] 362 N.Y.S. 2d 365 (Sup. Ct. 1974), *affirmed*, 378 N.Y.S. 2d 649 (App. Div. 1975).

[31] *Id.* 362 N.Y.S. 2d at 368.

CONCLUSIONS

A student's residence hall room is his home for all practical purposes, and he should have the same expectations of privacy there as any adult has in his home. Colleges may not compel a waiver of this right as a condition of attendance.

College officials have a right to make reasonable searches and administrative inspections for damage, unauthorized appliances, necessary maintenance, inventory, and the safety and security of students. However, at least one recent federal court has indicated that college officials must weigh the need for a search against the invasion of the student's fourth amendment rights: "[A] check or search of a student's dormitory room is unreasonable under the Fourth Amendment unless . . . (the institution) can show that the search furthers its function as an educational institution."[33]

Most courts have indicated that college authorities can search a room of they have reason to believe that it is being used for illegal purposes or for an activity that would materially and substantially interefere with the operation of the school. However, the courts in *Morale*[34] and *Smyth*[35] narrowly interpreted the function or mission of an educational institution, noting that searches for stolen property or illegal drugs served no legitimate purpose of the college.

Fourth amendment rights can be waived if consent is fully and intelligently given, and if such consent is free from intimidation and/or duress.

Before college officials enter a room to conduct a search or, in the case of law enforcement personnel, to conduct a search and possibly make an arrest, they should give notice of their identity and purpose, except when emergency circumstances justify not giving any notice.

College officials cannot share their authority with the police or delegate their authority to the police. If the college reserves the right to inspect a student's room for a limited number of legitimate purposes, this right cannot be transferred to the police for the same or other reasons, permitting the police to search a room without a warrant.

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[32] *See* Cox, *Constitutional Adjudication and the Promotion of Human Rights*, 80 Harv. L. Rev. 91 (1966); H. Friendly, The Dartmouth College Case and the Public-Private Penumbra (Dartmouth College, N.H. 1969); Levin, *Private Governments on the Campus, Judicial Review of University Expulsions*, 72 Yale L.J. 1362 (1963); Nelson, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 Colum. L. Rev. 656 (1974). *See also* Guillory v. Administration of Tulane Univ. of La., 203 F. Supp. 855 (E.D La. 1962); Power v. Miles, 407 F.2d 73 (2d Cir. 1968).

[33] Morale v. Grigel, 422 F. Supp. 988, 998 (D. N.H. 1976).

[34] *Id.*

[35] Smyth v. Lubbers, 398 F. Supp. 777 (W.D. Mich. 1975).

When a search involves the possibility of criminal activity, or could result in criminal prosecution, it leaves the realm of campus discipline and complete fourth amendment rights prevail.

When evidence is obtained by a private citizen, without the knowledge or participation of any government agency, it is admissible in a criminal prosecution even though it may have been illegally obtained based on fourth amendment standards.

Knowledge gained from an illegal search cannot be used against an individual in a court of law; and, in the opinion of the authors, it should not be used in a college disciplinary hearing.

A search should be made with a valid warrant, if at all possible, unless an emergency situation exists. The authors believe that, with the exception of administrative searches mentioned above, college officials should follow the same procedure. Fourth amendment rights are so basic that the minor inconvenience of obtaining a warrant is a small matter when weighed against the student's right to personal privacy.

There is no justification for routinely searching rooms, or for that matter, freely searching through desk drawers, clothes, or concealed areas within rooms.

An inventory of personal property is also a search and can only be conducted when the following two conditions are met: the police or college officials must have lawful custody of the property; and they must have acted in good faith in conducting the inventory without using it as a subterfuge for a warrantless search. The facts in the case must indicate that an inventory search was necessary and reasonable.

An observation, from a lawful vantage point, of illegal substances in plain sight is not a search in the constitutional sense, and evidence obtained by this means is admissible without violating the fourth amendment.

Private college officials are not required to adhere to the same constitutional requirements as their counterparts are in public colleges. However, just as in a tenant-landlord relationship, private college officials are not free to walk into a student's room at any time of the day or night. In addition, if private college officials act at the request of the police or in conjunction with the police, they must comply with the requirements of the fourth amendment.

COMMENT

The authors recognize the legitimate needs of colleges and universities to protect their property and students, and to maintain themselves as properly functioning education institutions. However, if the fourth amendment is considered an obstacle by officials, there is a good chance that an erosion of privacy and the concurrent destruction of human values associated with it will result.

We believe that colleges and universities should be instilling in students a respect for the principles inherent in the Bill of Rights, in general, and the fourth amendment, in particular. As William G. Buss so aptly stated,

> It would be highly desirable if the citizens of the United States who are now in school learn to value privacy, learn by the school's example that the society respects it, and learn that the courts will protect it from invasion of governmental searches that violate Fourth Amendment principles.[36]

It is always difficult to determine how a court will rule in a given case. However, in the opinion of the authors, courts, in general, have become increasingly responsive to a student's legitimate interests in fourth amendment guarantees. Conversely, it appears that the courts are less likely to uphold searches by college officials if the searches are not *directly* related to the purposes of the college as an educational institution.

We have attempted to update the application of the fourth amendment to the student-college relationship. It must be remembered, however, that this is an area of the law which is still unsettled and evolving.

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[36] Buss, *The Fourth Amendment and Searches of Students in Public Schools*, 59 Iowa L Rev. 739, 792 (1974).

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Bilingual/Bicultural Education—Update of *Lau v. Nichols*

Hendrik C. de Bruin
Chairman
Division of Education
Indiana University at South Bend

This paper concerns itself with an updating of cases, legal concerns, and educational practices regarding bilingual/bicultural education since the case of *Lau v. Nichols*[1] was decided. *Lau v. Nichols* was a class action suit in which it was argued that education had effectively been denied to Chinese-speaking children because English was the only language spoken in the public schools in San Francisco.

The court noted that as of April, 1973, there were 3,457 Chinese students in the school system who spoke little or no English, and that only 1,707 of those needing special instruction in English were receiving it. The plaintiffs had argued their case before the Ninth Circuit Court of Appeals which held there was no denial of equal education because *all* the children were given equal access to the standard English-taught curriculum.[2]

The United States Supreme Court, however, reversed the Court of Appeals decision noting that before a pupil can receive a high school diploma, he must meet the standard of proficiency in English. The Court stated that "students who do not understand English are effectively foreclosed from any meaningful education."[3]

The Supreme Court's decision was based on nonconstitutional grounds rather than on a violation of the equal protection clause of the fourteenth amendment. Justice Douglas, speaking for the majority, found that the failure to provide bilingual instruction violated paragraph 601 of the Civil Rights Act of 1964, which prohibits racial discrimination in any federally assisted program.

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1. Lau v. Nichols, 414 U.S. 563 (1974).
2. Lau v. Nichols, 483 F. 2d 791 (9th Cir. 1973).
3. Lau v. Nichols, 414 U.S. 563, 565 (1974).

The school district, by accepting federal funds, agreed to comply with Title VI of the Civil Rights Act of 1964 and all other rules and regulations issued by the Department of Health, Education and Welfare (HEW). In 1970, the HEW issued the following regulation:

> Where ability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to those students.[4]

The Court also relied on another HEW guideline which stated:

> School systems are responsible for assuring that students of particular race, color or national origin are not denied the opportunity to obtain the education generally obtained by other students in the system.[5]

The Court also stated that "simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination."[6]

It is of interest to this discussion to note that Justice Blackmun, while writing his concurring opinion, stated:

> I merely wish to make plain that when, in another case, we are concerned with a very few youngsters, or with just a single child who speaks only German or Polish or Spanish or any language other than English, I would not regard today's decision, or the separate concurrence, as conclusive upon the issue whether the statute and the guidelines required the funded school district to provide special instruction. For me, numbers are at the heart of this case and my concurrence is to be understood accordingly.[7]

The court failed to provide specific guidelines but used already existing HEW regulations. This decision did, however, recognize a private right of action under the Civil Rights Act for the invocation of paragraph 602 rights and remedies without having HEW participate at a party in the case.

Soon after the *Lau* decision, the Tenth Circuit Court of Appeals ruled, in *Serna v. Portales Municipal Schools*,[8] that Spanish-American students were deprived of their right to equal protection of the laws as guaranteed by the fourteenth amendment to the United States Constitution, and of their statutory rights under Title VI of the Civil Rights Act of 1964.

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[4] 35 Fed. Reg. 11,595 (1970).
[5] 33 Fed. Reg. 4,956 (1968).
[6] Lau v. Nichols, 414 U.S. 563, 569 (1974).
[7] *Id.* at 572.
[8] 499 F.2d 1147 (10th Cir. 1974).

A group of Spanish-American plaintiffs brought this suit as a class action alleging the school district's failure to provide an "adequate" bilingual program and its failure to structure the curriculum in other ways to provide for the special needs of a sizable number of Spanish-speaking students. The plaintiffs also contended that no teachers or administrators of Spanish descent had been hired.

This case was similar in nature to *Lau*. The court of appeals did not deem it necessary or appropriate to rule on the equal protection issue, but upheld the district court's decision concerning the violation of the provisions of Title VI. The court stated:

> The City of Portales, New Mexico, has a substantial number of Spanish surnamed residents. Accordingly, a sizable minority of students attending the Portales schools are Spanish surnamed. Evidence indicates that many of these students know very little English when they enter the school system. They speak Spanish at home and grow up in a Spanish culture totally alien to the environment thrust upon them in the Portales school system. The result is a lower achievement level than their Anglo-American counterparts, and a higher percentage of school dropouts. . . .
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> . . . Allegedly, there is discrimination in appellant's failure to provide bilingual instruction which takes into account the special educational needs of Mexican-American children; failure to structure a curriculum that reflects the historical contributions of people of Mexican and Spanish descent to the State of New Mexico and the United States; and failure to hire and employ any administrators including superintendents, assistant superintendents, principals, vice principals, and truant officers of Mexican-American descent.[9]

Standardized test data was introduced at the trial and the court responded in the following manner:

> Undisputed evidence shows that Spanish surnamed students do not reach the achievement levels attained by their Anglo counterparts. For example, achievement tests, which are given totally in the English language, disclose that students at Lindsey are almost a full year behind children attending other schools in reading, language mechanics and language expression. Intelligence quotient tests show that Lindsey students fall further behind as they move from first to the fifth grade.[10]

The Portales school system did, in fact, have a bilingual education program and this fact was introduced at the hearing. The plaintiffs felt that the program was inadequate and the judge ruled in their favor. He stated his concerns this way:

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[9] *Id.* at 1149.

[10] *Id.* at 1149-1150.

> At this hearing expert witnesses pointed out the fallacies of appellant's plan and in turn offered a more expansive bilingual-bicultural plan. The trial court thereafter fashioned a program which it felt would meet the needs of Spanish surnamed students in the Portales school system. We do not believe that under the unique circumstances of this case, the trial court's plan is unwarranted . . . There was adequate evidence that appellant's proposed program was only a token plan that would not benefit appellees.[11]

In this case, the New Mexico State Board of Education filed an amicus curiae brief saying that the relief granted constitutes unwarranted and improper judicial interference in the internal affairs of the Portales School District. The court replied to the concerns of the State Board of Education by stating:

> The New Mexico State Board of Education stresses the effect the decision will have on the structure of public education in New Mexico. It is suggested that bilingual programs will now be necessitated throughout the state wherever a student is found who does not have adequate facility in the English language. We do not share SBE's fear. As Mr. Justice Blackmun pointed out in his concurring opinion in *Lau*, numbers are the heart of this case and only when a substantial group is being deprived of a meaningful education will a Title VI violation exist.[12]

Another class action suit was brought on behalf of Chicano students against the Mesa County Valley School District in Colorado in an attempt to require the school district to provide a type of bilingual/bicultural education program acceptable to the plaintiffs.[13] Judge J. Winner stated in this decision:

> There exists no constitutional right to bilingual/bicultural education, and there has been no showing that inability to speak and understand the English language excludes more than a tiny handful (if that many) of national origin-minority group children from effective participation in the educational program offered in District 51. However, there has been a showing that District 51 has taken affirmative steps to rectify any possible language deficiency to assure that its instructional program will be available to all students. Plaintiffs have no case for a claimed constitutional violation because they do not assert segregation and there is no constitutional right to

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[11] *Id.* at 1154.

[12] *Id.*

[13] Otero v. Mesa County Valley Sch. Dist. No. 51, 408 F. Supp. 162 (D. Colo. 1975). This case was just recently reversed on the hiring issue only.

> bilingual/bicultural education. Plaintiffs have proven no case under the *Lau-Serna* doctrine.[14]

The court held:

> [T]he record disclosed no failure on the part of the school district to comply with any federal statute or regulation, and plaintiffs proved no case under the "Lau-Serna" doctrine which, unlike the instant case, dealt with large numbers of students who could not learn in English and with school boards that were making no real effort to meet the problem; and that plaintiffs had no standing to challenge the districts hiring practices.[15]

The court in *Otero* also looked at how students were achieving on tests and accepted the fact that out of 628 students *tested*, 8, or .0127%, were found to be Spanish-dominant, 5, or .0080%, were found to be essentially bilingual, and 4, or .0064%, were found to be Spanish-proficient. The judge said that in his opinion, "The presence of Spanish is not interfering with the English scores."[16] He also stated that "The policy of the State of Colorado is to encourage local school districts to develop bilingual skills and to assist in the transition of non-English speaking students to English."[17]

The following dicta, stated by Judge J. Winner in the *Otero* case, is particularly amusing regarding courts of law taking over the supervision of public schools:

> The recent proliferation of lawsuits against school districts, schools and school officials suggests that some people think that the courts should assume overall supervision of the nation's educational system, but I disagree, although I confess that I wonder if school personnel should not be awarded combat pay for their efforts in trying to educate in today's climate.[18]

The use of sweeping plans for bicultural education was found unacceptable by the court in *Keyes v. School District No. 1.*[19] The court stated "Bilingual education, moreover, is not a substitute for desegregation. Although bilingual instruction may be required to prevent the isolation of minority students in a predominantly Anglo school system, . . . such instruction must be subordinate to a plan of school desegregation."[20] The specific "Cardenas Plan" which the court rejected stated:

> [T]hat the poor performance of minority children in public schools results from "incompatibilities" between cultural and

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[14] *Id.* at 172.
[15] *Id.* at 162.
[16] *Id.* at 165.
[17] *Id.* at 172.
[18] *Id.* at 170 n.3.
[19] 521 F. 2d 465 (10th Cir. 1975).
[20] *Id.* at 480.

> developmental characteristics of minority children on the one hand, and the methods and expectations of the school system on the other. Because most schools are operated to meet the needs of middle-class Anglo children, the theory continues, they inevitably fail to meet the different needs of poor minority children. Conflicts between the Anglo system and the needs of minorities are pervasive. The Cardenas Plan, therefore, requires an overhaul of the system's entire approach to education of minorities; its proposals extend to matters of educational philosophy, governance, instructional scope and sequence, curriculum, student evaluation, staffing, non-instructional service and community involvement.[21]

The court felt that the district court's adoption of such a plan overstepped the limits of its remedial powers.

In Texas, the court examined the plaintiffs' allegation of discrimination by the school district in failing to provide a bilingual/bicultural education program.[22] The court stated:

> It is admitted that most Mexican-American students enter school with English language deficiencies and this brings us to the next contention of appellants, that a bilingual/bicultural education program is necessary to permit Mexican-American students to continue and develop intellectual capacity in Spanish while gradually becoming proficient in English.[23]

The plaintiff parents claimed that the school system's failure to apply for federally funded programs in bilingual education and its refusal to meet the special needs of Mexican-American children constituted a form of continuing discrimination. To this charge, the court replied:

> It now appears that a program was instigated in the 1973-74 school year in this regard, and that in January of 1974, a Texas statute was enacted requiring bilingual/bicultural programs in the elementary schools of Texas. Defendants represent that such a program was commenced for the first grade beginning with the 1974-75 term, and that one grade will be added each year through the sixth grade.[24]

The court also ruled that homogeneous ability grouping, like other nonracial methods of student assignments, is not constitutionally forbidden.

The Fifth Circuit Court of Appeals ruled on this point again in *McNeal v. Tate County School District*,[25] holding that the ability grouping of students, like any other non-racial method of student assignment, is constitutional.

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[21] *Id.* at 480-481.

[22] Morales v. Shannon, 516 F.2d 411 (5th Cir. 1975).

[23] *Id.* at 414.

[24] *Id.* at 415.

[25] 508 F.2d 1017 (5th Cir. 1975).

In *Arvizu v. Waco Independent School District,*[26] the appellate court commented on the district court's ability to accept certain plans for helping minority children by stating, "Although a district court has wide discretion in formulating remedial decrees, such discretion is abused where a district court 'approves a plan that, in the hope of providing better "quality education" to some children, has a substantial adverse effect upon the quality of education available to others.' "[27]

United States v. Texas Educational Agency[28] was an action filed against the agency and seven school districts, including the Austin Independent School District in which it was alleged that the systems discriminated against blacks and Mexican-Americans. Of particular interest to this discussion is the section of the court's decision dealing with bilingual education. It states:

> Because Mexican-American student are an identifiable minority entitled to equal protection of the laws, the court further held that they were entitled to equal education opportunities, including the setting up of special education programs, such as bilingual and bicultural education.[29]
>
> The AISD has an ongoing bilingual/bicultural education program that the Superintendent of Schools testified would continue "regardless of the level of federal funding." Indeed, state and federal law require as much.[30]

The *Texas Education Agency* decision details the various plans proposed by school systems for desegregation. it identifies, explains and evaluates the Cisneros-Austin I Plan, the Finger Plan, the Sixth Grade Center Plan and the Cardenas Plan, discussed in *Keyes v. School District No. 1.*[31]

The case of *Aspira of New York, Inc. v. Board of Education of the City of New York*[32] resulted in a consent decree providing that transitional bilingual instruction be offered in basic courses to students with English deficiencies, or, at least, to those whose abilities in English are inferior to their abilities in their native language.

After an investigation, the Office of Civil Rights of the New York City school system recently charged with violating civil rights laws in its treatment of public school students. The charges were based on violations of Title VI of the 1964 Civil Rights Act, the 1972 Education Amendments and Section 504 of the Rehabilitation Act of 1973, which bars discrimination against the handicapped.[33] The report culminated a three year investigation. It was issued on January 18, 1977 and stated that:

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[26] 495 F.2d 499d (5th Cir. 1974).
[27] *Id.* at 508.
[28] 532 F.2d 380 (5th Cir. 1976).
[29] *Id.* at 386.
[30] *Id.* at 398.
[31] 521 F.2d 465 (10th Cir. 1975).
[32] 72 Civ. 4002 (S.D.N.Y.).

> minority students are getting less resources, poor facilities and limited curricula;
> students whose primary language is other than English are not getting an adequate education;
> minority and female junior high school students are being tracked into less desirable vocational and special programs;
> minorities are being disciplined more harshly than others;
> handicapped students are given a shorter school day and are hampered by architectural barriers.[34]

As a follow-up to this first report, a 22 page letter was sent to the New York City school system by the Office of Civil Rights on October 5, 1977, outlining some of the same charges mentioned above and giving the board 45 days to develop a plan to bring the district into compliance with appropriate laws.[35]

A good overview of the state and the art of bilingual/bicultural education was recently published by Noel Epstein in his book entitled *Language, Ethnicity, and the Schools, Policy Alternatives for Bilingual-Bicultural Education.*[36] Quoting from his work,

> Since enactment of the Bilingual Education Act of 1968, the U.S. Office of Education (USOE) has been exploring ways to help these pupils, concentrating on a technique known as "transitional" bilingual education. The goal of this approach is to help students keep up with reading, math and other subjects in their native tongues while they are taught enough English to transfer to a regular classroom. After nearly nine years and more than half a billion dollars in federal funds, however, the government has not demonstrated whether such instruction makes much difference in the student's achievement, in their acquisition of English, or in their attitudes toward school.[37]

The question arises as to the possibility of using other approaches to help these students achieve more, and to solve the problems of the non-English speaking youngster. The Bilingual Education Act is funding 425 bilingual-bicultural projects in 68 languages and dialects during the fiscal year 1977. About 80% of the projects are in Spanish. In his book, Mr. Epstein explores these other possible methods of helping the bilingual child.

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[33] School Law News, January 21, 1977, at 3.

[34] *Id.*

[35] School Law News, Octobet 28, 1977, at 7.

[36] N. Epstein, Language, Ethnicity, and the Schools, Policy Alternatives for Bilingual-Bicultural Education, (Washington, D.C.: Institute for Education Leadership, 1977).

[37] *Id.* at 1.

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The October 17, 1977 issue of *Education U.S.A.* contains an article entitled *Which Road for Bilingual Ed*?, which discusses the Epstein publication mentioned above and some recent research on bilingual education conducted by the American Institutes for Research. The article states:

> In the AIR study, almost 85% of the bilingual ed teachers saw the program as a "maintenance" effort, and 70% of the enrolled students used English as their "dominant" language . . .
>
> Another point of confusion is which students should be enrolled in bilingual ed classes. HEW's Office of Civil Rights (OCR) backed by the U.S. Supreme Court's Lau decision, has required bilingual education for all students whose "primary or home language" is other than English. A child with a "home language" of Spanish may also be fluent in English. Should OCR then require bilingual ed for this child? Finally, there is the question of whether students actually learn better by starting with their mother tongue and gradually learning English. The AIR study suggests they do not . . . This year the federal government will put $135 million into the program. HEW's legislative office, while saying it has spent "more time on bilingual ed" than any other part of the ESEA reauthorization, will recommend a "cautious approach" in tightening up the law.[38]

Finally, as we look toward the future of bilingual education, the following quote, found in the October 31, 1977 issue of *Education U.S.A.*, is pertinent:

> *There is a "50-50 chance" Congress will expand bilingual education to interested English-speaking children in the coming reauthorization*, says Rep. Paul Simon, D-ILL., speaking to bilingual education directors in Washington, D.C., last week, Simon decried the "failure of our society" to teach foreign languages and cultures. Foreign language enrollments have dropped 15% in the last six years, he said. One way to remedy this is to allow English-speaking children to "voluntarily" enroll in bilingual classes, because "young people learn fastest from each other." This would also lessen "the very real danger of segregating young people" by language in bilingual classes. Simon, a member of the House subcommittee on elementary and secondary education, hopes to add such an amendment to Title VII of ESEA.[39]

CONCLUSIONS

The following conclusions can be drawn from the data collected and presented in this paper:

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[38] *Which Road for Bilingual Ed*?, Education U.S.A., Oct. 17, 1977, at 54.
[39] Education U.S.A., Oct. 31, 1977, at 71.

1. Parents who bring a class action suit against a school district to implement a bilingual education program, or to expand an existing program, should plead violation of Title VI of the Civil Rights Act of 1964, and not a violation of the equal protection clause of the fourteenth amendment.
2. A suit should only be brought if large numbers of students are being deprived of bilingual education, upholding the "Lau-Serna" doctrine.
3. School districts that have a bilingual program and can show that efforts are being made to increase the numbers of students involved will be relatively safe.
4. Achievement test data will substantially strengthen a case when it can be shown that minority students score lower than their non-minority counterparts.
5. There is no constitutional right to bilingual/bicultural education. Therefore, cases will be tried on other grounds.
6. Thus far, bilingual/bicultural education has made little difference in students' achievement, in their acquistition of the English language, or in their attitudes toward school.
7. It should never be assumed that bilingual education will solve all the educational problems of the non-English speaking child.
8. As we look toward the future, programs like "affirmative ethnicity" should be looked at critically. This is the standard approach used in programs promoting pupil attachment to their ethnic languages and histories while simultaneously learning the common English language and the common history.
9. It seems that if we are to help the non-English speaking pupil, tight restrictions and definitions of who is an eligible child need to be enforced so that the resources reach those children who have the greatest need.
10. Bilingual programs of the future should call for a curriculum that is compatible with the pupil's language, cultural background, socioeconomic class and level of achievement.

SELECTED REFERENCES

American Institutes for Research. *Interim Report, Evaluation of the Impact of ESEA Title VII Spanish/English Bilingual Education Programs.* Palo Alto, California: August, 1977.

de Bruin, Hendrik C. "Alternatives to the Legal Restrictions Imposed on the Use of Standardized Tests." *Education New Mexico* 16 (Spring 1977).

de Bruin, JoAnn and de Bruin, Hendrik C. "Help for the Classroom Teacher: Resource Rooms." *Education New Mexico* 19 (Fall 1975).

Epstein, Noel. *Language, Ethnicity, and the Schools, Policy Alternatives for Bilingual-Bicultural Education.* Washington, D.C.: Institute for Educational Leadership, 1977.

General Accounting Office. *Bilingual Education: An Unmet Need.* Washington, D.C.: GPO, May 1976.

Grant, Carl A., ed. *Multi-cultural Education: Commitments, Issues, and Applications.* Washington, D.C.: Association for Supervision and Curriculum Development, 1977.

National Center for Educational Statistics, HEW, *The Condition of Education,* vol. 3, pt. 1. Washington, D.C.: 1977. National School Public Relations Association. Education U.S.A. Arlington, Va.: all issues.

Reutter, E. Edmund and Hamilton, Robert R. *The Law of Public Education* 2d ed. Mineola, N.Y.: the Foundation Press, 1976.

School Law News. Washington, D.C.: Capitol Publications, Inc., all issues.

Turnbull, H. Rutherford. *Legal Aspects of Educating the Developmentally Disabled.* Topeka, Kansas: National Organization on Legal Problems of Education, 1975.

U.S. Civil Rights Commission Clearinghouse. *A Better chance to Learn: Bilingual-Bicultural Education.* Washington, D.C.: May 1975.

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The Battle to Reform Public School Finance Systems: 1968 to Present

RICHARD G. SALMON
ASSOCIATE PROFESSOR OF EDUCATIONAL FINANCE
VIRGINIA POLYTECHNIC INSTITUTE AND STATE UNIVERSITY

M. DAVID ALEXANDER
ASSOCIATE PROFESSOR OF EDUCATIONAL FINANCE
VIRGINIA POLYTECHNIC INSTITUTE AND STATE UNIVERSITY

INTRODUCTION

Until the late 1960's, litigation concerned with the financing of elementary and secondary education was largely instituted by aggrieved taxpayers challenging the right of the state to collect and redistribute tax revenues to other school districts in the state. However, commencing with the case of *McInnis v. Shapiro*[1] in 1968, and including the highly publicized *Serrano v. Priest*[2] decisions and the 1971 landmark case of *Rodriguez v. San Antonio Independent School District*,[3] there has been a continuous series of federal and state court cases challenging public school support programs in the United States.

There was considerable variation in the manner in which the cases were prepared and presented to the courts, but in most cases, the plaintiffs contended that they were denied equal protection under the State and/or Federal Constitution. A few cases found their way to the United States Supreme Court, while others were decided at the state level. While the United States Supreme Court ruled against those persons challenging the constitutionality of individual state school financing programs, there have been conflicting rulings in the state courts. The purpose of this paper is to review briefly the major federal and state cases dealing with fiscal equalization in state school support programs and to discuss, in depth, the conflicting rulings in the state courts with particular attention given

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1. 293 F. Supp. 327 (N.D. Ill. 1968).
2. 487 P.2d 1241, (Cal. 1971); 557 P.2d 929 (Cal. 1976).
3. 337 F. Supp. 280 (W.D. Tex. 1971), *rev'd*, 411 U.S. 1 (1973).

to the problems created by use of the "thorough and efficient" concept in *Robinson v. Cahill.*[4]

REVIEW OF THE FEDERAL CASES

The first of the fiscal equalization cases to reach the U.S. Supreme Court, *McInnis v. Shapiro,*[5] arose in Illinois. The plaintiffs sought a reduction of expenditure variation between local school districts and indicated that the variation in educational needs mandated consideration in the allocation of state revenues if equal protection under the fourteenth amendment would be satisfied. The U.S. District Court for the Northern District of Illinois experienced difficulty with what it viewed as a nebulous concept and indicated that there were no "discoverable and manageable standards" by which to determine whether the requirements of the fourteenth amendment were satisfied. In a critique of the decision, it was observed that "the two standards (posed by the plaintiffs) are mutually irreconcilable since educational needs may demand a much higher expenditure for certain children than for others."[6] The U.S. Supreme Court affirmed the lower court's decision without discussion and by doing so, delayed the definitive ruling in *Rodriguez v. San Antonio*[7] for over three years.

In a similar case, *Burruss v. Wilkerson,*[8] actually filed a few days earlier than *McInnis v. Shapiro*, it was charged that the Virginia state school support program violated the fourteenth amendment to the U.S. Constitution since state aid was not allocated to local school districts on the basis of educational needs. In addition, the plaintiff questioned the measure (*i.e.*, equalized property valuation per ADA) the state used in evaluating the tax-paying ability of the local school districts. In ruling that the system of financing public schools in Virginia was constitutional, the federal district court said:

> [T]he courts have neither the knowledge, nor the means, nor the power to tailor the public moneys to fit the varying needs of these students throughout the state. We can only see to it that the outlays on one group are not invidiously greater or less than that of another. No such arbitrariness is manifest here.[9]

As in the *McInnis v. Shapiro* case, the U.S. Supreme Court merely affirmed the lower court's ruling and set the stage for the landmark *Rodriguez v. San Antonio* decision.

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[4] 303 A.2d 273 (N.J. 1973); 335 A.2d 6 (N.J. 1975); 339 A.2d 193 (N.J. 1975); 358 A.2d 457.

[5] 293 F. Supp. 327 (N.D. Ill. 1968).

[6] Alexander, *Judicial Standard of Equality: A Definitional Problem, in* Critical Issues in Educational Finance 19-20 (Harrisonburg, Va.: Virginia Institute for Educational Finance, 1975).

[7] Rodriguez v. San Antonio Independent Sch. Dist., 337 F. Supp. 280 (W.D. Tex. 1971), *rev'd,* 411 U.S. 1 (1973).

[8] 310 F. Supp. 572 (W.D. Va. 1969), *aff'd per curiam,* 397 U.S. 44 (1970).

[9] *Id.* 310 F. Supp. at 574.

In 1971, the United States District Court for the Western District of Texas in *Rodriguez v. San Antonio Independent School District,*[10] accepted the plaintiff's position that the state must exercise "fiscal neutrality" in financing public schools. Briefly stated, the concept of fiscal neutrality requires that the quality of public education be a function of the state as a whole and not a function of the wealth of the local school district. The court also accepted the plaintiff's contention that education was of fundamental interest to the state and should be examined by the courts on the basis of "strict scrutiny." However, when the case was appealed to the United States Supreme Court in 1973, the lower court's ruling was overturned, resulting in a shattering defeat for those advocating the egalitarian position. Specifically, the Supreme Court held that the right to education is not a fundamental right explicitly or implicitly guaranteed by the United States Constitution. Since the Texas system did not violate the criteria of suspect class or fundamental right, the court held that Texas was not obliged to show a compelling interest on the part of the state in the school finance system at issue.

Since this definitive ruling by the Supreme Court in *Rodriguez v. San Antonio*, only one fiscal equalization case has entered the federal judicial system. In the 1976 case of *Scarnato v. Parker,*[11] the plaintiffs challenged the constitutionality of the Louisiana minimum foundation program under the equal protection clause of the fourteenth amendment. However, citing *Rodriguez*, the three member federal court granted the defendants' motion to dismiss the suit in its entirety.

In conclusion, federal litigation regarding fiscal equalization has revolved around the standard of equality of educational opportunity and equal protection under the fourteenth amendment. Although equal educational opportunity is a socially worthy concept, it has been very difficult for the federal courts to identify an operational definition as illustrated by the following confusing, and sometimes conflicting, statements by courts and litigants: "equality can be obtained by allowing local school districts the authority to tax themselves at sufficiently high levels to overcome wealth differences with other school districts;"[12] "equality can be attained by allocating resources on the basis of educational need;"[13] "equality may be accomplished by giving each student the same amount of money, one dollar—one scholar;"[14] "the state could allow unlimited local taxation but revenues earned in excess of a certain amount per pupil would be captured by the state;"[15] "equality requires that the state measure local school district wealth more accurately than by property valuations, possibly a combination of personal income and property;"[16] "equality assumes that poor children in all school districts are discriminated against, that all children regardless of wealth residing in school districts which fall below some predetermined wealth standard are discriminated against."[17]

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[10] 337 F. Supp. 280 (W.D. Tex. 1971).

[11] 415 F. Supp. 272 (M.D. La. 1976).

[12] Hargrave v. Kirk, 313 F. Supp. 944 (M.D. Fla. 1970), *vacated*, 401 U.S. 479 (1971).

[13] McInnis v. Shapiro, 293 F. Supp. 327, 328-330 (N.D. Ill. 1968).

[14] *Id.* at 330-331.

The difficulty of providing an operational definition for the rather vague concept of equality of educational opportunity is not unique to the federal courts. Since state constitutions are more expansive than the Federal Constitution, when the concept of equality of educational opportunity is coupled with even more nebulous phrases such as "primary obligation of the state,"[18] "general and uniform,"[19] and "through and efficient,"[20] apparently conflicting state court decisions appear likely.

REVIEW OF THE STATE CASES

The first of the state fiscal equalization cases to gain national attention was the *Serrano v. Priest*[21] decision in which the California Supreme Court ruled that the method of funding public elementary and secondary education was unconstitutional. In this extremely controversial case, the court held that both the fourteenth amendment and the state equal protection clause were violated because the state school finance system made the quality of education a function of the local school district's taxable wealth:

> We have determined that this funding scheme invidiously discriminates against the poor because it makes the quality of a child's education a function of the wealth of his parents and neighbors. Recognizing as we must that the right to an education in our public schools is a fundamental interest which cannot be conditional on wealth, we can discern no compelling state purpose necessitating the present method of financing. We have concluded; therefore, that such a system cannot withstand constitutional challenge and must fall before the equal protection clause.[22]

After the above ruling, knows as *Serrano I*, the California Supreme Court remanded the case to the trial court with specific instructions. As a result of the California Supreme Court's ruling in *Serrano I*, the

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[15] *Id.* at 332-333.

[16] Burruss v. Wilkerson, 310 F. Supp. 572-574 (W.D. Va. 1969).

[17] Rodriguez v. San Antonio Independent Sch. Dist., 411 U.S. 1, (1973).

[18] Thomas v. Stewart, No. 8275 (Polk County Ga., Super. Ct.)

[19] Northshore Sch. Dist. No. 417 v. Kinnear, 84 Wash. 2d 685, 530 P. 2d 178 (1974).

[20] Robinson v. Cahill, 303 A. 2d 273, 274 (N.J. 1976).

[21] Serrano v. Priest, 487 P. 2d 1241, (Cal. 1971).

[22] *Id.* at 1244.

California Supreme Court remanded the case to the trial court with specific instructions. As a result of the California Supreme Court's ruling in *Serrano I*, the California legislature attempted to make the allegations in the case moot prior to full trial proceedings on remand by passing two bills which brought about significant changes in the public school financing system. Nevertheless, the trial court ruled that while the public school financial system was not in violation of the fourteenth amendment to the U.S. Constitution, it did violate California's equal protection provision. In addition to other specific instructions, the trial court allowed the legislature a period of six years in which to bring the system into constitutional compliance and assured the legislature that the judgment did not require the adoption of any particular system of school finance.

The trial court's ruling was then appealed to the California Supreme Court by defendants in certain wealthy school districts. Interestingly, two of the original defendants, Wilson Riles, Superintendent of Public Instruction and Jessie Unruh, State Treasurer, filed briefs which supported the original ruling.

On December 30, 1976, the California Supreme Court affirmed the trial court's judgment in the decision which is commonly referred to as *Serrano II.*[23] Specifically, the supreme court said:

> Since such system before the court was shown on substantial evidence to involve a suspect classification (based on district wealth) and to touch upon the fundamental interest of education, the trial court properly followed Serrano I in subjecting it to the "strict scrutiny" test under which the state has the burden of establishing that the classification in question is necessary to achieve a compelling state interest. Applying this test, the court properly determined on findings supported by substantial evidence that the state failed to bear its burden and that the financing system before it was invalid as denying equal protection of the laws as guaranteed by the California Constitution.[24]

Immediately following the *Serrano I* decision in 1971, a United States district court in Minnesota handed down a similiar decision in *Van Dusartz v. Hatfield.*[25] The court agreed with the plaintiff's contention that the wealthier school districts in Minnesota not only had greater revenues per child but enjoyed a lower tax rate and it found that "the level of spending for public . . . education in Minnesota is profoundly affected by the wealth of each school district."[26] Further, the court observed that "a system of public school financing which makes spending per pupil a function of the school district's wealth violates the equal protection guarantee of the Fourteenth Amendment.[27]

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[23] Serrano v. Priest, 557 P.2d 929 (Cal. 1976).
[24] *Id.* at 958.
[25] 334 F. Supp. 870 (D. Minn. 1971).
[26] *Id.* at 877.

In 1972, the Michigan Supreme Court made a ruling similar to *Serrano* and *Dusartz* in the *Milliken v. Green*[28] decision. However, after first ruling that the Michigan system of financing public elementary schools was violative of the equal protection clause of the state's constitution, the court experienced a change of judges, and the decision was vacated. In the new decision, the court ruled that the evidence did not prove that the equal protection of the children in low wealth districts had been violated.

> Without disagreeing with either theory of defining educational opportunity—inputs or outputs—we cannot accept without criticism either of the further-narrowed definitions offered by the parties. The reduction of the sum total output to the accomplishment of the pupils on a few achievement tests would be grossly unjust to both the educators and the pupils, for education must extend far beyond the limits of verbal facility or mathematical proficiency. With respect to the input received by a school, the level of taxable resources within a district is only one of the myriad inputs into an educational system.[29]

Shortly after the *Rodriguez v. San Antonio* decision in 1973, the Arizona Supreme Court ruled that neither the equal protection clause of the state constitution nor the "general and uniform" provision had been violated in *Shofstall v. Hollins.*[30] The court modestly interpreted the "general and uniform" provision to mean that the state would provide a minimum school year, certify school personnel, and establish requirements for courses. The Arizona court cited *Rodriguez v. San Antonio* and indicated that there was not a constitutional question unless there was absolute denial. The court elected not to enter into the "thicket" of fiscal equalization, educational need, or fiscal neutrality. Instead, it was the opinion of the court that the state only had to provide for the rudiments of a system of free general education.

A state constitutional question regarding the financing of public schools was also raised in the 1973 case of *Blase v. State of Illinois.*[31] Specifically, the plaintiffs centered their case on the interpretation of a constitutional provision concerning the state's role in funding public education in Illinois. Article X, § 1, of the 1970 Illinois Constitution provided:

> Section 1 Goal—Free Schools
>
> A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities.

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[27] *Id.*
[28] 203 N.W. 2d 457 (Mich. 1972), *vacated*, 212 N.W. 2d 711 (Mich. 1973).
[29] *Id.* 212 N.W. 2d at 716.
[30] 110 Ariz. 88, 515 P.2d 590 (1973).
[31] 55 Ill. 2d 94, 302 N.E. 2d 46 (1973).

> The State shall provide for an efficient system of high quality public educational institutions and services. Education in public schools through the secondary level shall be free. There may be such other free education as the General Assembly provides by law.
>
> The State has the primary responsibility for financing the system of public education.

The plaintiffs contended that the last sentence of Section 1 requires that the State provide not less than 50 percent of the funds for public elementary and secondary education. The Illinois Supreme Court disagreed and ruled that the sentence in question was intended only to express a goal or objective, and did not state a specific command.

The next major state fiscal equalization case, *Northshore School District No. 417 v. Kinnear*,[32] arose in the State of Washington in 1974. The petitioner proffered the following four contentions of unconstitutionality: (1) that children are denied equal protection of the laws in violation of the fourteenth amendment and the state constitution due to a disparity of taxable resources per pupil; (2) that taxpayers in poorer districts are denied equal protection because they pay a higher tax rate than taxpayers in wealthier districts to raise the same amount of revenue per pupil; (3) that the state has failed to adhere to the provision of the Washington constitution which reads: "It is the paramount duty of the state to make ample provision for the education of all children . . .;[33] and (4) that the state has failed to provide a general and uniform system of public schools as mandated by the state constitution.

The court rejected the first claim because the statistical evidence showed that the assessed valuation had little, if anything, to do with the quality of education. The court also indicated that there was no evidence to support the claim that one district or another provided superior or inferior educational opportunities.

In reply to the second contention that the plaintiffs were denied equal protection, the court said:

> That it takes more millage to raise the same amount of dollars on low valued property than it does on high valued property is no more than a meaningless truism and can be answered with another truism that the lower the value of one's property the lower one's taxes, neither truism having anything to do with the equal protection clause of both constitutions so long as everybody in the taxing scheme pays the same rate. Differences in assessed valuation per pupil among the various districts do not to a constitutional degree substantially affect the amounts of

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[32] 530 P.2d 178 (Wash. 1974).
[33] *Id.* at 184.

> revenue per pupil available nor the amount expended per pupil; nor the cost per pupil in providing about the same quality of education throughout the state.[34]

The court noted that even if the state were converted into a single district to afford equal educational opportunities would be virtually impossible becaue expenditures per child would vary due to the infinite variations in geography, climate, terrain, social and economic conditions, transportation, special services, and local choices of extra curricula and other services.

The plaintiff's third contention that the state failed to make ample provision for the education of all children, as provided by the state constitution, was also rejected.

> [A]lthough the state must assume the duty of making ample provision for the education of all children and is required to do so without discrimination as to race, sex, or national origin, constitutionally speaking, that duty or function is the same as any other major duty or function of state government.[35]

In reply to the fourth contention that the state must provide a system that is general and uniform, the court said:

> A general and uniform system, that is, a system which within reasonable constitutional limits of equality makes ample provision for the education of all children, cannot be based upon exact equality of funding per child because it takes more money in some districts per child to provide about the same level of educational opportunity than it does others.[36]

The Washington Supreme Court indicated that a general and uniform system is a system that provides every child with free access to certain minimum and reasonably standardized educational programs. The court amplified the term "minimum program" by suggesting that public education should include instructional facilities offering educational opportunities up to at least the twelfth grade with provision for a child to transfer between districts without loss of standing.

In 1975, the Idaho Supreme Court reversed a lower court's decision in *Thompson v. Engleking*[37] and held that the Idaho Constitution did not require equal educational opportunity for all students attending public elementary and secondary schools. Further, the court indicated that there was no evidence to support the contention that the quality of educational opportunity is dependent on educational expenditures or that equal educational opportunity is dependent upon the amount and value of the taxable property within the school district in which the pupil resides. Consequently, it was the opinion of the court that the lower court had erred in its interpretation of the Idaho Constitution. The supreme court said, "The record does not demonstrate a failure by the legislature to comply with its mandate to establish a system of basic, thorough, and uniform education; nor does that record demonstrate an inadequacy of funding to maintain that system of education."[38]

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[34] *Id.* at 191.
[35] *Id.* at 198.
[36] *Id.* at 202.
[37] 537 P.2d 635 (Idaho 1975).

A case that gained national attention and illustrates a court's difficulty in dealing with a state's school finance system in the wake of *Rodriguez* is New Jersey's *Robinson v. Cahill.*[39] Although a final decision was not made until 1975, the case was first decided by the Superior Court of New Jersey Law Division in 1972. The facts presented by the plaintiffs showed that 67 percent of public school revenue came from the local tax base which produced great per pupil expenditure variation among school districts. In agreement with the plaintiffs, the court found that the system discriminated against pupils in poor districts and also discriminated against taxpayers by imposing an unequal burden for public education. Therefore, in the opinion of the court, the system violated the requirement of equal protection under the law contained in both the New Jersey and the Federal Constitutions. Most importantly, the court ruled that the New Jersey Constitution was violated by the state's failure to provide a "thorough and efficient system of public education."[40]

Shortly after the lower court's decision in *Robinson v. Cahill,* the U.S. Supreme Court handed down the landmark decision of *Rodriguez v. San Antonio Independent School District.*[41] As might be expected, the *Rodriguez* decision was taken into consideration by the New Jersey Supreme Court when the *Robinson v. Cahill* decision was appealed. The New Jersey Supreme Court stated that the state constitution's equal protection clause may be more expansive than the fourteenth amendment of the Federal Constitution; nevertheless, the court refused to hold the New Jersey system of financing in violation of the state's equal protection clause and preferred to support the lower court's ruling that the New Jersey school finance system did not meet the constitutional mandate for "thorough and efficient." The New Jersey Supreme Court in speaking to the issue of equal protection said, "[w]e have not found helpful the concept of a 'fundamental' right. No one has successfully defined the term for this purpose."[42] In retrospect, it is somewhat ironic that the New Jersey

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[38] *Id.*

[39] 303 A. 2d 273 (N.J. 1973); 335 A. 2d 6 (N.J. 1975); 339 A. 2d 193 (N.J. 1975); 358 A. 2d 457 (N.J. 1976).

[40] *Id.* 303 A.2d at 282.

[41] 411 U.S. 1 (1973).

[42] Robinson v. Cahill, 303 A. 2d 273, 282 (N.J. 1973).

Supreme Court had a definitional problem with "fundamental" right since it utilized the equally nebulous term of "thorough and efficient" in holding the method of financing schools in New Jersey unconstitutional.

Despite its most honorable and worthy intentions, the New Jersey Supreme Court experienced a great deal of difficulty in providing the legislature with an operational definition of "thorough and efficient" or appropriate guidelines for implementing a public school finance program which would meet the court's interpretation of this elusive concept. In the original decision handed down on April 3, 1973, the New Jersey Supreme Court shifted the burden to the legislature to define and develop a school finance program that would satisfy the constitutional requirement of "thorough and efficient." The following statement best summarizes the original intent of the court:

> The mandate that there be maintained and supported "a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen" can have no other import. Whether the State acts directly or imposes the role upon local government, the end product must be what the Constitution commands. A system of instruction in any district of the State which is not thorough and efficient falls short of the constitutional command. Whatever the reason for the violation, the obligation is the State's to rectify it. If local government fails, the State government must compel it to act, and if the local government cannot carry the burden, the State must itself meet its continuing obligation.[43]

After hearing arguments, the court gave the legislature until December 31, 1974 to act in an appropriate manner to remedy the unconstitutional aspects of the existing New Jersey system of public school finance. After much judicial maneuvering, in an order dated January 23, 1975, the New Jersey Supreme Court stated that "no. . . legislation was enacted by December 31, 1974, although efforts to that end continued through said date. The matter now returns to the court for the ordering of the appropriate remedies to effectuate the court's original decision."[44]

Simultaneously, the court scheduled a hearing for all parties on March 18, 1975 for the purpose of granting relief. The first matter to be considered was the definition of a "thorough and efficient system of free public schools" and the translation of that definition into fiscal terms. The responses at the hearing illustrated the complexity and diversity of thinking when attempting to define "thorough and efficient" or "equal educational opportunity."

The New Jersey Attorney General proposed that the court adopt "process standards" to be formulated by the State Department of

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[43] *Id.* at 294.

[44] Robinson v. Cahill, 335 A.2d 6 (N.J. 1975).

Education. Each local district would determine its educational needs and translate those needs into educational objectives or standards. Such an assessment would take each child into consideration to insure that the educational needs and standards were correlative with the basic skills of computation and communication. The Attorney General's proposal was criticized on the grounds that it provided no state-wide standards of educational quality. It was also argued that the court's concept of equal educational opportunity required application to the entire state and the proposed system of "process standards" did not meet the test.

However, the Governor endorsed the proposed "process standards" system and suggested that all six areas of the existing state aid program be enjoined and that all funds be distributed through a district power equalizing formula referred to as the Bateman formula. The Bateman formula was criticized because low-wealth districts would receive financial windfalls while other districts would lose considerable state aid. Numerous remedies and combinations of remedies were suggested.

Although in agreement with the Governor, the plaintiffs appeared to focus on substantive educational issues relating to "thorough and efficient" to the exclusion of fiscal definitions. For example, the plaintiffs suggested that "thorough and efficient" was a very fluid concept and was "only definable in the context of a given controversy at a given time."[45] The plaintiffs further contended that the "outcome" and "process" goals formulated by the New Jersey State Board of Education should be adopted and converted into fiscal terms through "controlled experimentation."[46]

Other arguments concerned output measure of the educational process. Representatives of the American Civil Liberties Union (ACLU) and the National Association for the Advancement of Colored People (NAACP) suggested that equal educational opportunity could be defined and the "thorough and efficient" requirement satisfied by utilizing a state-wide assessment program coupled with the use of competency based education.

The brief filed by New Jersey Education Reform Project (NJEFP) stated that the state's role must be defined in terms of the child mastering the basic skills of reading, math, and writing. The concept of "thorough and efficient" would be satisfied through acquisition of the basic skills. In addition, the NJEFP suggested that the state's educational obligation "must be sufficiently comprehensive to prepare a child for citizenship and successful competition in the labor market.[47] This statement is almost identical to the statement in the 1973 New Jersey Supreme Court decision and did little to clarify the definition of "thorough and efficient."

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[45] Brief for Plaintiffs—Respondents on Remedies at 7-9, Robinson v. Cahill, 339 A.2d 193 (N.J. 1975).

[46] *Id. See also* Lindquist & Wise, *Developments in Education Litigation: Equal Protection*, 5 J. of L. & Educ. 1 (1976).

[47] Amicus Brief at 27, (Docket No. 8618, filed Feb. 24, 1975), Robinson v. Cahill, 339 A.2d 193 (N.J. 1975).

After hearing arguments, it would appear that the Supreme Court of New Jersey had made very little progress in its attempt to define the concept of "thorough and efficient" precisely. In addition to the court's rather vague interpretation of "thorough and efficient," the litigants' opinions were equally vague and conflicting.

Perhaps we could gain some understanding of the court's interpretation of the evasive concept of "thorough and efficient" by examining the following statement made by the *Robinson v. Cahill* courts: (1) "Thorough and efficient means more than adequate or minimal."[48] Certainly, this statement must be considered in direct opposition to the argument made by the NJEFP which focused on the acquisition of basic skills. (2) "(It is) . . . clear that there is a significant connection between the sums expended and the quality of the educational opportunity."[49] Obviously, the court has accepted the principle that expenditure per pupil is a valid indicator of educational quality. (3) "[W]e should not be understood to mean that the State may not recognize differences in area costs, or a need for additional dollar input to equip classes of disadvantaged children for the educational opportunity."[50] Apparently, the court was willing to accept the variation in expenditure per pupil as long as the State can substantiate the educational need. (4) "Tax levied to raise revenues . . . should be applied uniformly to all members of the same class of taxpayers."[51] It would appear that the court was in favor of the original *Hargrave v. Kirk*[52] decision which prohibits local school districts from exceeding a statutory tax limit. (5) "it is clear that some kind of uniform state-wide tax can be adopted by the State to finance "thorough" without relying on a real property tax."[53] Obviously, the court was in favor of the implementation of some form of non-property tax to provide the necessary revenue to fund a massive increase in state aid to education. (6) "If the Bateman Act were fully funded, it would meet the test of thorough."[54] This statement needs no amplification since the court had previously accepted a fully funded Bateman formula as a system which would satisfy its interpretation of "thorough and efficient."

On May 23, 1975, the court handed down its opinion based on the March 18, 1975 hearing and the previous rulings.[55] In this opinion, the court proposed a provisional remedy until the state could come into complete compliance with the "thorough and efficient" mandate. Specifically, the court required that two of the six categories of state aid (*i.e.*, minimum support aid and save harmless funds) be redistributed under the Bateman formula while the other four categories (*i.e.*, building aid, foundation program; atypical pupils aid; transportation aid; and the state pension fund contributions) be distributed in accordance with the existing system. The minimum support and "save harmless" categories comprised 64 percent of total state aid, excluding the pension fund for 1974-75. The court warned that the above provisional plan should not be misconstrued to mean that the state was meeting its constitutional mandate to the children of the state.

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[48] Robinson v. cahill, 287 A.2d 187, 211 (N.J. Super. Ct. Law Div. 1972).
[49] *Id.* 303 A.2d 273, 277 (N.J. 1973).
[50] *Id.* at 297-298.
[51] *Id.* at 276.
[52] 313 F. Supp. 944 (M.D. Fla. 1970).
[53] Robinson v. Cahill, 287 A.2d 187, (N.J. Super. Ct. Law Div. 1972).
[54] *Id.* at 211.
[55] *Id.* 339 A.2d 193, 196-220 (N.J. 1975).

In an attempt to comply with the New Jersey Supreme Court's directive, the state legislature passed the Public School Finance Act of 1975 and the plaintiffs immediately filed the following objections to the new Act: (1) a comprehensive definition of the term "thorough and efficient" was not provided as required by the court; (2) the legislature had not provided for funds; and (3) inequities would still exist between wealthy suburban areas and disadvantaged urban areas even if the Act is fully funded.

The court disagreed with the plaintiffs' contentions and ruled that the Public School Finance Act of 1975 apparently would meet the constitutional mandate to provide a system of "thorough and efficient" schools if fully funded. The court indicated that, after implementation, actual experience would ultimately determine the Act's constitutionality.

However, by May 13, 1976, the legislature had still not provided full funding for the new Act and the supreme court enjoined both local and state officials from expending any funds after July 1, 1976 for the support of New Jersey's public schools unless the Act was fully funded.[56] On July 1, 1976, the schools officially closed for two weeks giving the legislature impetus to pass an income tax. The passage of the income tax persuaded the court that the Public School Finance Act of 1975 would be properly funded and the injunction was lifted.

Finally, the New Jersey legislature, with the passage of the Public School Finance Act of 1975, as amended by chapters 77, 97, and 135, Laws of 1976, and by chapter 149, Laws of 1977 addressed the problem of providing a definition for the concept of "thorough and efficient."[57]

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[56] *Id.* 378 A. 2d 457 (N.J. 1976).

[57] Excerpts from the Public School Finance Law of 1975: 18A-7A-2. a. The Legislature finds and declares that: (1) The New Jersey Constitution provides that the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of 5 and 18 years is a legislative respontibility; (2) It has been determined by the Supreme Court of New Jersey that the constitutional requirement has not been met and that action must be taken to correct any deficiencies; (3) Extensive efforts have been made by the Executive and Legislative branches of State Government and others since the Supreme Court's decision to determine the content of a thorough and efficient system of education and how it may be assured; (4) Because the sufficiency of education is a growing and evolving concept, the definition of a thorough and efficient system of education

Litigation Since Robinson v. Cahill

As indicated earlier, the drive for fiscal equalization of educational opportunity and educational finance reform will continue to rest with individual state courts and legislatures for the foreseeable future. It has been suggested that "backlash litigation" has occurred in some states in which educational finance reform laws have been enacted for the purpose of forestalling *Robinson v. Cahill*-type suits. Others suggest that such litigation is a return to "first generation" caes in which aggrieved taxpayers from wealthy areas challenged the constitutionality of their state's school finance system.[58]

Two cases that illustrate "backlash litigation" and directly contradict each other are the Montana case of *State ex rel. Woodahl v. Straub*[59] and the Wisconsin case of *Buse v. Smith*.[60]

Both states enacted modifications of negative state aid provisions in their equalization formulas whereby the state "recaptures" from local school districts the revenue raised in excess of a mandated levy on local property valuation. The recaptured revenue is then redistributed by the state to poorer school districts that do not meet state-guaranteed spending levels.

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and the delineation of all the factors necessary to be included therein, depend upon the economic, historical, social and cultural context in which that education is delivered. The Legislature must, nevertheless, make explicit provision for the design of State and local systems by which such education is delivered, and should, therefore, explicitly provide after 4 years from the effective date of this act for a major and comprehensive evaluation of both the State and local systems, and the sufficiency of education provided thereby; (5) In order to encourage citizen involvement in educational matters, New Jersey should provide for free public schools in a manner which guarantees and encourages local participation consistent with the goal of a thorough and efficient system serving all of the children of the state; (6) A thorough and efficient system of education includes local school districts in which decisions pertaining to the hiring and dismissal of personnel, the curriculum of the schools, the establishment of district budgets, and other essentially local questions are made democratically with a maximum of citizen involvement and self-determination and are consistent with Statewide goals, guidelines and standards; and (7) Such a system should be in part locally funded to encourage involvement of and assure the financial supervision by the residents of the local unit, and in part State funded, to equalize Statewide the tax effort required for a thorough and efficient system of free public schools. 18A-74-2. b. The Legislature, therefore, hereby accepts the responsibility: (1) to define the overall goal of a thorough and efficient system of free public schools in New Jersey; (2) To establish guidelines within which such a system shall operate; (3) To delegate to appropriate State and local agencies the authority: (a) To establish goals and objectives consistent with legislative guidelines, and (b) To define standards of performance, including uniform Statewide standards of pupil proficiency in basic communications and computational skills, necessary to indicate achievement of the goals and objectives; (4) To establish a funding structure which will ensure that adequate financial resources shall be available to enable a system of free public schools to operate throughout the State; and (5) To monitor the system of free public schools and provide for corrective action when necessary to ensure adequate progress toward the achievement of goals and objectives.

[58] *See, e.g.* Alexander & Jordan, Constitutional Alternatives for State School Finance, in Financing Education: Fiscal and Legal Alternatives, (Johns, Roe, S.K. Alexander, K.F. Jordan eds.) (Columbus, Ohio: Charles E. Merrill Publishing Co., 1972).

[59] 520 P.2d 776 (Mont. 1974).

[60] 247 N.W.2d 141 (Wis. 1976).

In the 1974 case of *State ex rel. Woodahl v. Straub*, the Montana Supreme Court reasoned that the statutory requirement that each county levy a basic 40 mill tax for both primary and secondary schools constituted a state rather than a local tax. Consequently, the legislature was free to use the recaptured funds for any public purpose, including the funding of public education.

In contrast, the Wisconsin Supreme Court in the 1976 *Buse v. Smith* decision struck down the negative-aid provisions of Wisconsin's public school financing statutes when it reasoned that these provisions were in violation of the state constitutional rule of uniform taxation. The court said:

> [T]he Uniformity Clause requires that the tax not only be uniform within the taxing district, but also that it be used for the public purpose of such local taxing district . . . the negative aid tax, if viewed as a local tax, is unconstitutional because it mandates a local tax, while uniform within the taxing district, is not to be used for local public purposes of such local taxing district.[61]

A similar case, *Boothbay v. Longley*,[62] was filed in a lower court in Maine and challenged the constitutionality of that state's School Finance Act of 1975, which has a recapture provision as one of its features. According to the Lawyer's Committee for Civil Rights Under Law, an extensive record has been developed before a referee in this case and this record will provide a factual base should an appeal be considered by the Maine Supreme Judicial Court.[63]

Another case decided after the *Robinson v. Cahill* decision arose in Oregon in 1976. In *Olsen v. State of Oregon*,[64] on appeal to the Oregon Supreme Court, the plaintiffs alleged that the Oregon Public school finance system violated the Oregon Constitution because it created unequal educational opportunities and variation in local control due to fiscal inequities. Further, the plaintiffs alleged that the legislature had not complied with the constitutional mandate to establish a uniform and general system of common schools. Contrary to the *Robinson v. Cahill* decision, the Oregon Supreme Court ruled:

> We hold that the Oregon system of school financing does not violate the Oregon Constitution. Our decision should not be interpreted to mean that we are of the opinion that the Oregon system of school financing is politically or educationally desirable. Our only role is to pass upon its constitutionality.[65]

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[61] *Id.* at 156.

[62] No. 75-918 (Kennebec Super. Ct. 1975).

[63] Lawyer's Committee for Civil Rights Under Law, Summary of State-Wide School Finance Cases Since 1973 (Washington, D.C. 1977).

[64] 554 P.2d 139 (Or. 1976).

[65] *Id.* at 149.

One of the most recent decisions was handed down on April 19, 1977. The Supreme Court of Connecticut, in *Horton v. Meskill,*[66] affirmed a lower court's holding that the present public school finance system violated an article of the state constitution which stated, "There shall always be free public elementary and secondary schools in the state. The general assembly shall implement this principle by appropriate legislation."[67]

Specifically, the court indicated that the right to an education is so basic and fundamental that an infringement of that right must be strictly scrutinized. When the Connecticut public school fiance system was examined, the court found that it relied primarily on the local property base without regard to disparity in fiscal ability to support an educational program. However, the court added that it did not view absolute equality as a requirement of the state constitution and the state logically should recognize differences in educational costs based upon variations in educational needs and economic factors.

CONCLUSIONS

During the last nine years since the *McInnis v. Shapiro* case, there has been a monumental amount of litigation concerned with the financing of public elementary and secondary education. In 1973, the United States Supreme Court provided a definitive ruling in the case of *Rodriguez v. San Antonio Independent School District* in answer to the charge that the Texas school financial program failed to provide equal protection guaranteed by the fourteenth amendment to the United States Constitution. However, there have been seemingly conflicting rulings in the state courts. On one side, there are four cases (*Serrano v. Priest, Robinson v. Cahill, Van Dusartz v. Hatfield,* and *Horton v. Meskill*) that support the charge that individual state school finance systems are in violation of their respective state constitutions. On the other side, there are several cases (*e.g., Shofstall v. Hollins, Milliken v. Green, Northshore School District No. 417 v. Kinnear, Thompson v. Engleking* and *Olson v. State of Oregon*) in which the courts have rejected similar charges.

As suggested in *Horton v. Meskill,* it is extremely difficult to analyze state school fiscal equalization decisions and accurately predict how a court in another state will rule in a seemingly similar situation. As stated by the court, "Because educational financing systems vary from state to state, and because the provisions of state constitutions vary from state to state, decisions in other states raising the issue under a state constitution are of little value as precedents."[68]

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[66] 332 A. 2d 113, (Conn. Super. Ct. 1974); 376 A. 2d 359 (Conn. 1977).

[67] Conn. Const. art. VIII, § 1.

[68] Horton v. Meskill, 332 A.2d 113, 115 (Conn. Super. Ct. 1974).

Conflicting state court decisions are further exemplified by *Buse v. Smith* in Wisconsin and *Woodahl v. Straub* in Montana in regard to negative aid provisions of state school finance systems. Another dramatic illustration is *Thompson v. Engleking* wherein the court said, "*Robinson v. Cahill* is such a case reaching a conclusion contrary to what we hold is a proper disposition of this appeal."[69]

If it is possible to detect trends for future court decisions, at least six pending state cases should be considered. The Supreme Court of Washington has agreed to hear *Seattle School District No. 1 of King County, Washington v. State of Washington*,[70] challenging the constitutionality of the present lack of state funding. The court ruled against a somewhat similar challenge in *Northshore School District No. 417 v. Kinnear.* Originally, the *Seattle School District No. 1* case was filed in the Washington Supreme Court but it was remanded to the Superior Court for the County of Thurston for trial. The Washington Supreme Court has indicated that immediate appeal could be taken following final disposition at the trial level. Earlier this year, the lower court ruled in favor of the plaintiffs who maintained that the present level of state funding is unconstitutional because the state was not making ample provision for the education of all children residing within its borders as required by article IX, § 1 of the Washington State Constitution.

Although the court was not concerned with expenditure variations among local school districts, it indicated that the state was failing to meet its obligation to fund a basic education. In a lengthy opinion, the court said in part that "the paramount duty of the state to make ample provision for education is not met by the legislature simply by providing resources sufficient to fund the 'general and uniform system of public schools.' "[71]

In a West Virginia decision, *Pauley v. Kelley*,[72] handed down on June 14, 1977 by the Circuit Court of Kanawha County, the plaintiff contended that the statutory school finance system of West Virginia had failed to provide a "thorough and efficient" system of public education as mandated by article XII, § 1 of the state constitution. The court agreed with the plaintiff that substantial inequities exist in the quality of educational opportunities offered by the fifty-five West Virginia school districts and, in certain cases, the constitutional standard of "thorough and efficient" is not met. Although the State Superintendent of Public Instruction agreed with the plaintiff's allegations, the court indicated that the financing system, in and of itself, is not unconstitutional and is not the reason for certain school district's constitutional inadequacy. The case is on appeal to the West Virginia Supreme Court. Its outcome will be interesting because of the similarity in wording between the West Virginia and the New Jersey Constitutions.

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[69] Thompson v. Engleking, 537 P. 2d 635, 651 (Idaho 1975).

[70] Civ. No. 53950 (Thurston County Wash. Super. Ct. 1977) (mem.).

[71] *Id.* at 80-81.

[72] Civ. No. CA-75-1268 (Kanawha County Cir. Ct. 1977) (mem.).

In Arkansas, the plaintiffs in *Alma School District No. 30 v. Dupree*[73] filed suit alleging the denial of substantially equal educational resources and opportunities. The plaintiffs contend that the Arkansas financing system is in violation of both the Arkansas Constitution and the equal protection clause of the fourteenth amendment to the Federal Constitution.

The *Thomas v. Stewart* case,[74] originally filed in a lower court in Georgia in 1974, charged that the state financial system failed to comply with the state constitution which imposes a "primary obligation" on the state to provide an adequate education for all citizens. Preparation for the trial is still underway.

Other pending cases, including *Unified School District No. 229 v. Kansas*[75] and *Board of Education of the City School District of the City of Cincinnati v. Essex*,[76] challenge their respective state public school finance systems under state constitutional provisions.

When the above cases are adjudicated, they will provide the student of educational finance and law with additional information in order to predict more accurately the future of fiscal equalization litigation in the state courts. However, in the opinion of the writers, the weight of the federal cases, coupled with recent decisions rejecting attacks on state school finance systems, will inhibit many state courts from entering the confusing and perplexing world of fiscal equalization of educational opportunity.

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[73] Civ. No. 77-Y06 (Pulaski County Ch., filed Jan. 28, 1977).

[74] No. 8275 (Polk County Super. Ct., filed Dec. 19, 1974).

[75] Civ. No. 132851 (Shawnee County Dist. Ct., filed Dec. 20, 1976).

[76] Civ. No. A 7602725 (Hamilton County C.P., filed April 5, 1976).

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Serrano II: Equal Access to School Resources and Fiscal Neutrality — A View From Washington State

Michael E. Andrews*
Attorney at Law
Jones, Grey & Bayley
Seattle, Washington

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INTRODUCTION

In recent years much attention has been accorded the concept of district power equalizing (DPE). Many hope that a system of educational subsidization based upon DPE could solve the crisis in school financing that plagues virtually every state in America. This is an understandable but ultimately vain hope.[1] *Serrano v. Priest*[2] *(Serrano I* and *Serrano II)* and similar cases grapple with the problem of distributing educational resources through the proxy of an assault upon the method of school revenue production; they offer a solution based on the premise that an equitable system of school-related taxation will, ipso facto, yield a fair distribution of educational resources. But these two separable concerns are, in fact, not so neatly correlated as the California Supreme Court assumed them to be.

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* B.S., 1965, Stanford University and St. Louis University; J.D., 1973, University of Washington. Member, Washington Bar. The author wishes to advise readers that, as a trial lawyer representing petitioners in major school finance litigation pending before the Washington Supreme Court, this commentary is necessarily written from a position of advocacy.

[1] DPE is an inadequate means of dealing with the school financing problem because, as this commentary will later show, it fails both adequately to account for variations in the educational needs of school children and to guarantee any minimum level of expenditure for those needs. *See* notes 55-72 and accompanying text *supra*. The inadequacies of this particular solution and those similar to it have, however, been encouraged by the rejection of earlier attacks on the school finance problem that were based on the concept of educational need. *See, e.g.*, McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd per curiam sub nom*. McInnis v. Ogilvie, 394 U.S. 322 (1969) [lack of judicially manageable standards made controversy nonjusticiable].

[2] Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971) (Serrano I);

A better approach to solving the school financing problem would treat separately the twin concerns of taxational and educational equity; it is the purpose of this paper to sketch the broad outlines of such an approach. Part I reviews the decision of the California Supreme Court in *Serrano I* as it relates to these concerns and the manner in which the state district court on remand (with subsequent Supreme Court approval in *Serrano II*) attempted to utilize the concept of fiscal neutrality to resolve these problems. This part then concludes with a review of the unique equal protection analysis utilized in *Serrano II* and the potential impact of this analysis on school resource development. Part II provides a review and critique of the school finance schemes suggested in *Serrano II* as constitutionally acceptable alternatives to the existing system of school finance. Part III briefly discusses a suggested legislative response to *Serrano II*—the key feature of which is the separation of revenue production from distribution.

I. SERRANO I AND II: AN OVERVIEW

A. Serrano I

The evil that John Serrano Jr. set out to cure was the conditioning of a child's access to essential public school resources upon his own wealth or that of his neighbors within that school district. The plaintiff-petitioners in *Serrano I* thus alleged that:

> As a direct result of the financing scheme . . . substantial disparities in the quality and extent of availability of educational opportunities exist and are perpetuated among the several school districts of the State. . . . The educational opportunities made available to children attending public schools in the Districts, including plaintiff children, are substantially inferior to educatonal opportunities made available to children attending public schools in many other districts of the State....[3]

In short, it was contended that the California school financing system discriminated among school children on the basis of wealth.

Serrano v. Priest, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976) (Serrano II), *cert. denied*, 45 U.S.L.W. 3822 (U.S. June 15, 1977).

[3] Serrano I, 5 Cal. 3d at 590, 487 P.2d at 1244, 96 Cal. Rptr. at 604.

The defendants responded in three ways. They argued: (1) that the "basic aid"[4] portion of state-provided revenues was allocated equally among all pupils regardless of local wealth and that state "equalization aid"[5] afforded proportionally greater benefits to property-poor school districts; (2) that neither the measure of assessed valuation per pupil nor the measure of expenditure per pupil necessarily indicated the relative wealth of school districts or their residents; and (3) that "the wealth of a school district does not necessarily reflect the wealth of the families who live there."[6] The court dismissed the first two contentions, observing that a substantial part of a school district's budget was derived from local property wealth and that property-poor districts could not produce as much school revenue as property-rich districts even if the former taxed themselves at much higher rates than the latter.[7] Because *Serrano I* was an appeal from the granting of a general demurrer to the plaintiffs' complaint in the trial court,[8] the state supreme court also dismissed the respondents' assertion that district real property wealth per pupil and individual student (or student family) poverty were uncorrelated. The court observed, "[t]he simple answer to this argument is that plaintiffs have alleged that there is a correlation between a district's per pupil assessed valuation and the wealth of its residents, and we treat these material facts as admitted by the demurrers."[9] Thus, for procedural reasons only, the court in *Serrano I* accepted as true the petitioners' original allegation that where one found a school district with a low average real property assessed valuation per pupil one would generally also find low average levels of individual wealth, and vice versa.

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[4] " 'Basic state aid' consists of a flat grant to each district of $125 per pupil per year, regardless of the relative wealth of the district." Serrano I, 5 Cal. 3d at 593, 487 P.2d at 1247, 96 Cal. Rptr. at 607. *See* Cal. Educ. Code §§ 17751, 17801 (West Supp. 1977) (current version at Cal. Educ. Code §§ 41790, 41800 (West Spec. Pamph. 1976)).

[5] Equalization aid is distributed in inverse proportion to a district's wealth. To determine the amount of equalization aid a district will receive, the State Superintendent of Public Instruction ascertains how much local property tax revenue would be generated if the district levied a tax of $1 on each $100 of assessed valuation in elementary school districts and $.80 per $100 in high school districts. *See* Cal. Educ. Code § 17702 (West Supp. 1977) (current version at Cal. Educ. Code § 41761 (West Spec. Pamph. 1976)). To that figure, the Superintendent adds $125 per pupil basic aid grant. If the total of these two amounts is less than the foundation program minimum for that district (minimum expenditure per pupil guaranteed by the state legislature), the state contributes the difference. *See* Cal. Educ. Code §§ 17901, 17902 (West Supp. 1977) (current version at Cal. Educ. Code §§ 41810, 41811 (West Spec. Pamp. 1976)). Equalization funds guarantee to the poorer districts a minimum amount of support, while wealthier districts may not receive such assistance. Serrano I, 5 Cal. 3d at 593, 487 P.2d at 1247, 96 Cal. Rptr. at 607. After Serrano I, the legislature made various changes in foundation levels that affected the computation of equalization aid. *See* Serrano II, 18 Cal. 3d at 742, 557 P.2d at 935, 135 Cal. Rptr. at 351.

[6] Serrano I, 5 Cal. 3d at 600, 487 P.2d at 1252, 96 Cal. Rptr. at 612.

[7] *See id.* at 611, 487 P.2d at 1260, 96 Cal. Rptr. at 620.

[8] *Id.* at 591, 487 P.2d at 1245, 96 Cal. Rptr. at 605.

[9] *Id.* at 600-01, 487 P.2d at 1252, 96 Cal. Rptr. at 612.

The court then discussed the "indispensable" role that education plays in the modern industrial state. It asserted that this role has two significant aspects: "[F]irst, education is a major determinant of an individual's chances for economic and social success in our competitive society; second, education is a unique influence on a child's development as a citizen and his participation in political and community life."[10] As a result of the unique importance of education in our democratic society, the court in *Serrano I* felt compelled to treat a child's right to a publicly provided education as a "fundamental interest."[11] Having found such an interest, the court then was required to utilize the "strict scrutiny"[12] standard of equal protection review, thereby shifting the burden to the state to show a compelling interest justifying the existing school finance system. Thus, the following conclusions of the supreme court were before the trial court on remand:

(1) A child's right to public education in California is a fundamental interest.

(2) The existing scheme for school finance in California invidiously discriminated against the poor, provided petitioner's allegations were true.

(3) The plaintiff-petitioners were entitled to prove that there was a strong positive correlation between school district real property wealth and individual wealth.[13]

B. The Proceedings on Remand: A Proxy Strategy

Yet, on remand the plaintiffs apparently made no showing of a correlation between individual student wealth and district real property wealth. The focus in the trial court in fact shifted from a concern for poor students and low-wealth districts to a concern exclusively for the comparative disadvantages of low-wealth vis-à-vis high wealth districts. The evidence would indicate, however, that in California there is no reliable correlation between school district real property wealth and personal wealth.[14] A study including within its data base San Francisco, Oakland, and surrounding suburbs, for example, shows that in the early 1970's nineteen percent of the families residing in the San Francisco-Oakland metropolitan area earned less than $3,000 per year; in the surrounding suburbs, however, only fourteen percent of the families did.[15] These statistics indicate that the poor are where you find them, which may or may not be in a property-poor school district.[16] This lack of a

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[10] *Id.* at 605, 487 P.2d at 1255-56, 96 Cal. Rptr. at 615-16.

[11] *Id.* at 609, 487 P.2d at 1258, 96 Cal. Rptr. at 618.

[12] For a review of the developments in fundamental interests analysis, see San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).

[13] In order to show that the state had invidiously discriminated against the poor, there would have had to have been a showing by the petitioners that the poor were treated worse than the non-poor by California's system of school finance. A showing that some poor people lived in property-poor school districts, but were treated similarly, and that other poor people lived in property-rich districts, would not suffice to meet this evidentiary burden, absent a showing that the state prevented movement by the poor from property-poor districts to property-rich districts. Faced with a similar failure to meet the requisite burden of proof, the United States Supreme Court in *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973), stated: "For these two reasons—the absence of any evidence that the financing system discriminates against any definable category of 'poor' people or that it results in the absolute deprivation of education—the disadvantaged class is not susceptible of identification in traditional terms." *Id.* at 25 (footnote omitted).

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[14] Davis, *Taxpaying Ability: A Study of the Relationship Between Wealth and Income in California Counties*, in PROCEEDINGS OF NEA TENTH CONFERENCE ON SCHOOL FINANCE 199-203 (1967) [hereinafter cited as Davis]. In Kansas, to the extent that there is a relationship between real property wealth and per capita income, it seems to be an inverse one. *See* Ridenour & Ridenour, *Serrano v. Priest: Wealth and Kansas School Finance*, 20 U. KAN. L. REV. 213 (1972). *See also* Morris & Andrews, *Ample Provision for Washington's Common Schools: Northshore's Constitutional Promises to Keep*, 10 GONZ. L. REV. 19, 22 nn. 13-16 (1974).

[15] Berke & Callahan, *Serrano v. Priest: Milestone or Millstone for School Finance?*, 21 J. PUB. L. 23 (1972).

[16] A report prepared by the Senate Office of Research, California State Legislature, discloses the following information about the Average Daily Attendance (ADA) of students:

	Assessed Valuation Per ADA	*Ratio to State Average of Gross Income Per ADA (a)*	*Percent children Below Poverty Level (b)*	*Median Assessed Value of Homes (c)*
State Averages	$12,424	1.00	11.80	$ ---
Emery Unified School District	92,151	0.91	31.25	3,979
Piedmont Unified School District	14,904	2.12	1.72	11,503

(a)—Income of families and unrelated individuals.

(b)—Children 6-17 years old from families below poverty level.

(c)—Single family residences.

See Senate Office of Research, Serrano Reform: Where Will the Money Go? 2 (1975). Thus, when only real property assessed valuation is used as the standard for determining school district wealth, the Emeryville school district, at nearly 7½ times the state average, would be considered extraordinarily wealthy. Yet, almost one-third of its students are below the poverty level. On the other hand, the Piedmont school district is less than twenty percent above the state average in property wealth but has more than twice the state average gross income per ADA; less than two percent of its school children are below the poverty level. The report summarizes its findings as follows: "There is little relationship between the AV/ADA [assessed valuation/average daily attendance] of the school districts and the presence of children six to 17 years old from families earning less than the poverty level." *Id.* at 3-4.

demonstrably strong correlation between low property wealth school districts and poor families may have encouraged plaintiffs' counsel to abandon a direct attack on the original problem, the relation between a school child's access to essential public school resources and that child's wealth, and instead to adopt a proxy strategy.

The central concern of the court in *Serrano II* was equality of public school resource deployment;[17] yet, at the urging of the plaintiffs, the court dealt with this concern indirectly through the "proxy", or substitute, of public school revenue production.[18] It tacitly but erroneously assumed that a system providing equality of revenue production will necessarily provide equality of public school resource deployment. All other things being equal, property- rich school districts can raise money for school purposes more easily than property-poor school districts where state taxation of local real property is a major source of local school revenue.[19] It is also true that both the value of real property within a school district and the average daily attendance (ADA)[20] of school children within that district are exogenous variables over which the district can exercise no control. Yet, because these two variables substantially determine the amount of money per ADA of a school child available to the local school district for the deployment of school resources, the plaintiffs in *Serrano* argued that the state's school financing scheme placed an unfair tax burden on property-poor districts and therefore created an inequitable distribution of school resources to such districts.[21] These burdens result from accidents of geography, political boundary decisions and private choices regarding real property development. All of these factors make access to public educational resources dependent upon the fortuitous aggregation of real property wealth within a given school district. The plaintiffs argued that such a classification by wealth violated the equal protection provisions of the California Constitution.[22]

By linking the concept of equitable taxation with that of equitable school resource deployment, the plaintiffs in *Serrano* challenged the constitutionality of the system of district revenue production as though they were attacking the true concern, public school resource deployment. Indeed, the court in *Serrano II* seemed concerned with resource deployment, not revenue production, when it stated that "the school financing system before the court fails to provide equality of treatment to all the pupils in the state."[23] The fairness of a system of revenue production is not, however, necessarily related to the central concern in *Serrano*, the fairness of a system of school resource deployment. But because the plaintiffs' strategy focused on the unequal burdens associated with revenue production, the role of the local school district as tax collector was given a special and undeserved prominence, and the relative real property wealth of each district became the cynosure of the litigation. This is unfortunate for a number of reasons.

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[17] Serrano II, 18 Cal. 3d at 768-69, 557 P.2d at 953, 135 Cal. Rptr. at 369 (1976).

[18] An understanding of these two terms, "public school resource deployment" and "public school revenue production," is central to an understanding of *Serrano II*. "Public school revenue production" refers to the system of taxation employed by the state to raise school revenues from taxpayers. "Public school resource deployment" refers to the system of distributing school resources (or the money necessary to obtain them) to school districts and, through those districts, to school children.

[19] Serrano II, 18 Cal. 3d at 744-45, 557 P.2d at 937, 135 Cal. Rptr. at 353.

[20] Average Daily Attendance is computed by adding together the number of students actually present on each school day and dividing that total by the number of days school was taught. Serrano I, 5 Cal. 3d at 592 n.4, 487 P.2d at 1246 n.4, 96 Cal. Rptr. at 606 n.4.

[21] Brief for Plaintiffs at 182, Serrano I, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

[22] CAL. CONST., art. 1, § 7(a,b); art. 4, § 16.

First, as was discussed earlier,[24] poor school children do not necessarily reside in property-poor school districts. The purported correlation between property-rich districts and rich district residents seems to work well enough when, as in *Serrano*, the Baldwin Heights and Beverly Hills Unified School Districts are compared. But, the hypothesis cannot be maintained when, for example, one looks at the San Francisco Unified School District. In San Francisco, unlike Beverly Hills, the high assessed valuation of real property per ADA student is largely attributable to the presence of substantial commercial and industrial development rather than to that of highly assessed residential property values. By any standard, the percentage of poor students in the San Francisco public schools is much greater than that in Beverly Hills, though both districts are property-rich.[25] Moreover, some of the poorest people live in areas with some of the greatest property wealth, *e.g.*, next to factories or other commercial establishments. To treat those people and their school children as rich because they live in property-rich school districts and to penalize them for their unfortunate residential location, as would be done under the district power equalizing scheme advanced by the plaintiffs in *Serrano II*, would not only be unfair but would also be at cross-purposes with the fundamental concern addressed in the *Serrano* litigation, the conditioning of a school child's access to necessary public school resources upon his family's or his school district neighbors' wealth.

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[23] Serrano II, 18 Cal. 3d at 747, 557 P.2d at 939, 135 Cal. Rptr. at 355.

[24] *See* Davis, *supra* note 13.

[25] Information in the computer data base used by the California Senate Education Committee indicates that for 1976 the San Francisco Unified School District had more than 2½ times the statewide average real property assessed valuation (AV) per average daily attendance (ADA) students, but thirty-five percent of San Francisco's students were from families below the poverty level. In contrast, in the Beverly Hills Unified School District, which had more than 2½ times the state average AV/ADA, less than one percent of the students were from families below poverty level.

Second, defining wealth as real property assessed valuation fails to take into account those persons who own their own homes, but who are living on modest incomes or pensions. Such people would not ordinarily be considered rich, although they would be treated as such for the purposes of a definition that is grounded primarily on a measure of real property values. Furthermore, the plaintiffs in *Serrano*, preoccupied with inter-district wealth disparities, ignored the problem of municipal overburden[26] in their quest for fiscal neutrality. This problem, which *Serrano II* leaves for the legislature to solve, [27] would not be solved by a district power equalizing scheme.

C. Serrano II: An Unique Equal Protection Analysis

As has been suggested earlier,[28] equal access to educational resources was held a fundamental interest by the court in *Serrano II* both because of the individual benefits produced by education and because the state equal protection clause requires the elimination of irrational and invidious legislative classifications. The proxy of school district real property wealth was used by the *Serrano* plaintiffs to show that some property-poor school districts must impose a relatively heavier tax burden on their residents in order to provide their school children with adequate educational resources. Thus, public school resource deployment was dealt with indirectly through a constitutional challenge to the method of school revenue appropriation. The present system of school finance in California was found to be unconstitutional by the state supreme court because a school child's entitlement to a public education is a "fundamental interest," and the state could show no compelling justification for wealth-based discrimination in the production of school resources.[29]

It is important to examine this equal protection analysis carefully. The court mandates equality of treatment because education is too vital to be restricted in an unequal way; it is both a "major determinant of an individual's chances for economic and social success,"[30] and also a "unique influence on a child's development as a citizen and his participation in political and community life."[31] This justification for the court's analysis depends upon the uniqueness and importance of what education does, upon individual value judgments concerning the private benefits to the recipient of education, and upon individual perceptions about the usefulness of education in the context of a democratic government.

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[26] "Municipal tax overburden refers to high property tax rates for other governmental services than education." Finding of Fact No. 174, Serrano v. Priest, Civ. No. 938254 (Cal. Super. Ct., Aug. 30, 1974). A convenient way to think of municipal overburden is in relation to the statewide average percent of local taxes that support local non-school governmental functions such as police, fire and related municipal services. Normalizing a community's municipal non-school tax burden with respect to the state average provides a useful index of overburden. For example, if the statewide average percentage of total local taxes that support non-school local governmental services were fifty percent, then a school district in a community that spent fifty percent of its local taxes on non-school local governmental services would have a municipal overburden of 1.00 (0.50/0.50 = 1.00), or none. A district that had a municipal burden of sixty percent would have a municipal overburden of 1.20 (0.60/0.50 = 1.20); whereas, a district with a municipal burden of forty percent would have a municipal overburden of 0.80 (0.40/0.50 = 0.80), or an *underburden* of twenty percent ocmpared to the state average.

[27] Serrano II, 18 Cal. 3d at 759 n.38, 557 P.2d at 946, 135 Cal. Rptr. at 362.

[28] *See* text accompanying notes 10 & 11 *supra*.

[29] Serrano II, 18 Cal. 3d at 776, 557 P.2d at 958, 135 Cal. Rptr. at 374.

Compare this analysis with that utilized by the United States Supreme Court in striking down, on equal protection grounds, a statute that allowed whites only to be seated at the front of a municipal bus.[32] There is nothing inherently valuable about sitting anywhere on a bus. Racial discrimination in seating was proscribed by the Court solely because equality is important *in itself*, not because of the value to which equal access is given. Similarly, the United States Supreme Court has held that no official encouragement of discrimination results from the closing of public swimming pools, because both black and white citizens are equally deprived of the use of the closed facilities.[33]

Underlying these decisions is the assumption that equal access to state-provided opportunities, without regard to the intrinsic value of those opportunities, must be available to all without invidious or irrational distinctions. There may be controversy in a particular case as to whether the classifications are invidious or irrational, but once courts determine that the classifications should be so characterized, then such classifications violate the principle of equal protection. But the Supreme Court has not required that the state make available public buses and public swimming pools. Those things are not, as a matter of constitutional law, intrinsically valuable. The court has merely said that *if* they are made available by the state, *then* they must be made available to all without invidious discrimination, such as those based on race, against potential users.

Serrano II is different in a crucial aspect from these federal decisions. In *Serrano II* the right to an education was found to be a fundamental interest because of the intrinsic value of education. The United States Supreme Court would presumably allow California to close all public swimming pools within the state rather than allow nonwhites freely to use them. Access to public swimming pools is not safeguarded because swimming is not constitutionally protected for its intrinsic value, either to the swimmer or to society at large. But could the California legislature satisfy the mandate of *Serrano II* by enacting a district power equalizing[34] statute, abolishing the guaranteed basic aid[35] and equalization aid[36] and limiting the amount that could be raised with district power equalizing to $125 per ADA of a student (the present level of basic aid) with no permitted voter override? Such a school finance scheme, rather clearly, would no longer entail "the conditioning of the availability of school revenues upon district wealth."[37] All districts, without regard to real property wealth, would be able to raise $125 per ADA student with the same rate of local real property taxation. Thus, in terms of strict equal protection analysis, all ADA students wherever they attended school in California would be treated equally without regard either to their own personal wealth or to the wealth of their school district.

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[30] Serrano I, 5 Cal. 3d at 605, 487 P.2d at 1255-56, 96 Cal. Rptr. at 615-16.

[31] *Id.*, 487 P.2d at 1256, 96 Cal. Rptr. at 616.

[32] *See* Gayle v. Browder, 352 U.S. 903 (1956).

[33] *See* Palmer v. Thompson, 403 U.S. 217 (1971).

This hypothesized financing scheme would, in all probability, violate the mandate of the California Supreme Court because of the uniqueness and importance of education, as announced in *Serrano I*.[38] It would be a cruel hoax, indeed, to concede the intrinsic importance of education to individuals and to society and to invoke the "compelling state interest" test because of that importance, while simultaneously permitting the substantial deprivation of access to an educational as long as *all* those affected suffer equal but not total deprivation. In fact, *Serrano II* stated that any school financing system that conditioned "the availability of school revenues upon district wealth . . . *and* . . . the dependency of the quality of education upon *the level of district expenditure*—must be declared invalid unless it finds justification sufficient to satisfy the applicable equal protection test."[39] Although this language is dictum and the issues surrounding the latter point were neither pleaded, argued nor proven at trial, this declaration clearly goes beyond the strict equal protection principles utilized by the trial court.[40] Because the California Supreme Court *did* at least indicate a willingness to expand strict equal protection analysis, it would appear that if a future case squarely presents the question of a constitutionally required "level of district expenditure", the court would require a *minimum* level of protection from the state.[41]

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[34] See note 1 *supra*.

[35] See note 4 and accompanying text *supra*.

[36] See note 5 and accompanying text *supra*.

[37] Serrano II, 18 Cal. 3d at 756, 557 P.2d at 944, 135 Cal. Rptr. at 360.

[38] "We are convinced that the distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a 'fundamental interest.' " Serrano I, 5 Cal. 3d at 608-09, 487 P.2d at 1258, 96 Cal. Rptr. at 618.

[39] Serrano II, 18 Cal. 3d at 756, 557 P.2d at 944, 135 Cal. Rptr. at 360 (emphasis added).

[40] The California Supreme Court noted the following statement by the trial court judge: "What the *Serrano* court imposed as a California constitutional requirement is that there must be uniformity of treatment between the children of the various school districts in the State because all the children of the State in public schools are persons similarly circumscribed. The equal-protection-of-the-laws provisions of the California Constitution mandate nothing less than that all such persons shall be treated alike. If such uniformity of treatment were to result in all children being provided a low-quality educational program, or even a clearly *inadequate* educational program, the California Constitution would be satisfied. This court does not read the *Serrano* opinion as requiring that there is any constitutional mandate

The California Supreme Court did not discuss the level of minimum protection that may be constitutionally required, how that level should be determined, or the nexus that must be shown to exist between school expenditures and the quality of education. These are questions that have been discussed, however, in *Seattle School District No. 1 v. Washington.*[42] In that case, petitioners alleged that the State of Washington was not meeting its constitutional duty to make "ample provision" for the education of its school children.[43] The state moved for summary judgment, claiming, *inter alia,* that there were no judicially manageable standards for determining ampleness, citing *McInnis v. Shapiro.*[44] The motion was denied; after nine weeks of trial the court held that the issue was judicially manageable[45] and that the state was not meeting its constitutional duty to make "ample provision." It further declared that after July 1, 1979, the state, which was already subsidizing more than fifty-eight percent of the Seattle district's budget for the 1975-76 school year,[46] could no longer rely upon locally-voted revenues to support those educational programs necessary for the state to meet its constitutional duty.[47]

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for the State to provide funds for each child in the State at some magic level to produce either an adequate-quality educational program or a high-quality educational program. It is only a disparity in treatment between equals which runs afoul of the California constitutional mandate of equal protection of the laws." *Id.* at 754 n.28, 557 P.2d at 943 n.28, 135 Cal. Rptr. at 359 n.28 (quoting the trial court's memorandum opinion at 59) (emphasis in original).

41. Professor Michelman has proposed a minimum protection theory as an intepretation of the Fourteenth Amendment. The analysis logically applicable to the equal protection provision of the California Constitution. *See* Michelman, *On Protecting the Poor Through the Fourteenth Amendment,* 83 Harv. L. Rev. 7 (1969).

42. Seattle School Dist. No. 1 v. State, Civ. No. 53950 (Wash. Super. Ct., Jan. 14, 1977) (memorandum of intended decision), *appeal docketed,* No. 44845 (Wash. Sup. Ct., Mar. 31, 1977).

43. Seattle School Dist. No. 1 v. State, Civ. No. 53950 at 1 (Wash. Sup. Ct., Jan. 14, 1977) (memorandum of intended decision), *appeal docketed,* No. 44845 (Wash. Sup. Ct., Mar. 31, 1977). The Washington Constitution provides: "It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, cast or sex." Wash. Const. art. 9, § 1.

44. 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd. per curiam sub nom.* McInnis v. Ogilvie, 394 U.S. 322 (1969), *McInnis* is discussed in *Serrano I.* 5 Cal. 3d at 615-17, 487 P.2d at 1263-65, 96 Cal. Rptr. at 623-25.

45. Seattle School Dist. No. 1 v. State, Trial Judgment at 3, ¶ 6.

46. Final Budget Report No. F 196, Seattle School District No. 1 (1975-76). Most of the remaining maintenance and operation revenue is obtained by annual district elections that authorize the taxing of the real property within the school district and the retention of all revenue thereby accrued to operate the schools. This process is similar to the "override" system in California.

47. In *Seattle,* the trial court filed its eighty-four page memorandum opinion on January 14, 1977. The 620 findings of fact and 67 conclusions of law and judgment were filed on March 17, 1977. Notice of appeal was filed by the State of Washington on March 31, 1977.

The California Supreme Court will not be required to face the question of the constitutional minimum of state-provided aid to education that arose in *Seattle* unless the complaint in some future lawsuit shows a nexus between the quality of education and the level of district expenditure.[48] Although full treatment of that important subject is beyond the scope of these remarks, it should be noted that the use of econometric analysis adapted to the presently inadequate standards for measuring educational effectiveness will provide scant help but no significant harm to potential plaintiffs.[49]

II. ALTERNATIVE FINANCING SCHEMES SUGGESTED IN *SERRANO II*

Serrano II delineated several alternatives to the present financing system that, in the court's view, represented constutionally acceptable solutions to the California school finance crisis:

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[48] The question might arise in an action on behalf of students in a local school district with a low annual educational expenditure, but in which district power equalizing makes available to a local ADA student equal quantities of school dollars for each tax rate unit. In such a case, if the district elected to have a very low tax rate and, therefore, a very low level of district expenditure per ADA student, a lawsuit might be brought alleging that the quality of education was unconstitutionally impaired because of the low level of district expenditure.

[49] The attempt to quantify and predict the relationship between educational "inputs" (*e.g.*, student-teacher ratios, teaching techniques, student home environment, etc.) and educational "outputs" (*e.g.*, student achievement, etc.) is a growing science. This science has borrowed research techniques from the physical and biological sciences, most particularly standard multiple or linear regression analysis. Unfortunately, the underlying assumptions (and assumptions must be made to employ this scientific technique) about the relationship between educational inputs and outputs are often stated in the simplest of mathematical expressions, even though educational researchers agree that the process of education is a complex and subtle phenomenon. This use of simplistic formulae is usually justified by educational researchers on two grounds. First, simple equations make manipulation of data easier. Second, since it is not known whether other more complex mathematical formulae are any more likely to provide correct descriptions of the education process, the simpler models are utilized. These studies (often referred to as educational production function studies) have not yet provided much that is useful either in assisting educational policy judgments or in guiding the courts or legislatures in this area. One of the major flaws in these studies is that no confidence can be placed in conclusions about the correlation or the lack of correlation between educational inputs and educational outputs. This is because the assumptions implicit in the study as to the mathematical relationship among the variables (*e.g.*, the assumption of linearity) are unverified. For example, a showing of a low correlation between class size and student reading levels may be due to the fact that these variables were weakly correlated or because the assumed mathematical nature of the relationship was incorrect. The independent variable (class size) and the dependent variable (reading level) may, for example, be highly and positively correlated, but that correlation would never be disclosed by an educational production function study based on an incorrect assumption about the relationship between class size and reading levels. Scientific research in education is thus relatively undeveloped. Some of its early limitations derived from the fact that the principal investigators were "educators," not scientists or mathematicians. Increasingly, however, the investigators in educational research are becoming more sophisticated in their understanding of the uses and limitations of their scientific tools. Thus, it can be predicted with confidence that future research in this important area will be more careful, more credible, and ultimately useful.

> These alternative methods, which are "workable, practical and feasible," include: "(1) full state funding, with imposition of a statewide property tax; (2) consolidation of the present 1,067 school districts into about five hundred districts, with boundary realignments to equalize assessed valuations of real property among all school districts; (3) retention of the present school district boundaries but the removal of commercial and industrial property from local taxation for school purposes and taxation of such property at the state level; (4) school district power equalizing, which has as its essential ingredient the concept that school districts could choose to spend at different levels but for each level of expenditure chosen the tax effort would be the same for each school district choosing such level whether it be a high-wealth or a low-wealth district; (5) vouchers; and (6) some combination of two or more of the above."[50]

The alternatives of district consolidation, removal of commercial and industrial property from local taxation, and district power equalizing are unattractive solutions to the school funding crisis because they continue to treat as one problem what in fact are two separate but related problems: revenue production and public school resource deployment.[51]

A. *District Consolidation*

Even if consolidation created districts with essentially equal ratios of real property assessed valuation per ADA student, it could not guarantee that such tax parity would continue. Not only are demographic patterns constantly changing, but real property also becomes more or less valuable as development patterns change. Today's worthless desert is tomorrow's high-valued shopping center or housing tract. While one school district experiences a declining enrollment, an adjacent district may have a burgeoning student population. Neither property values nor student population is within the control of any school district. Thus, district consolidation would be a stopgap measure at best, destined to fail in providing a lasting solution to the school finance problem. Furthermore, the periodic realigning of school district boundaries would cause considerable disruption in school attendance. A student who formerly walked to a convenient local school might find that he was assigned to a distant and inconvenient school when his block was incorporated in a new district.

The apportionment and redistricting cases decided by the Supreme Court in the 1960's[52] are examples of the kind of problem that can and should be avoided by the California legislature in its response to *Serrano II*. The Court has faced unending difficulties in determining how much deviation from mathematically equal representation is constitutionally permissible.[53] Where possible, the judiciary should be spared from having to answer this type of question because numerically specific answers (other than "zero") cannot justifiably be transformed into general and immutable principles of law. Lacking the guidance of such principles, courts necessarily decide cases in a haphazard fashion that creates more problems than it resolves.

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[50] Serrano II, 18 Cal. 3d at 747, 557 P.2d at 938-39, 135 Cal. Rptr. at 354-55 (quoting the trial court's finding of fact no. 198).

[51] *See* notes 14-27 and accompanying text *supra*.

[52] *See, e.g.*, Lucas v. Colorado Assembly, 377 U.S. 713 (1964); Roman v. Sincock, 377 U.S. 695 (1964); Davis v. Mann, 377 U.S. 678 (1964); Maryland Comm. v. Tawes, 377 U.S. 656 (1964); WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964); Reynolds v. Sims, 377 U.S. 533 (1964).

B. Restructuring the Commercial Tax Base

The alternative of retaining existing school district boundaries and taxing commercial and industrial property at the state rather than at the local level presents similar difficulties. A school district with a high average assessed valuation of residential real property, such as the Beverly Hills Unified School District, still maintains a substantial tax advantage over school districts with a low average, such as the Baldwin Park Unified School District. If the state-collected property tax were used to supplement the locally-collected taxes in districts with low averages, the problem than becomes one of how much the state subsidy should be. If the state subsidizes districts so that they may all fund their programs at the level of the highest district on an ADA student basis, then the result is essentially identical to that achieved by full state funding. However, if the state subsidy is at some lower level, the legislature may have difficulty harmonizing that decision with the mandate of the California constitution, particularly in light of the trial court's findings.[54]

C. District Power Equalizing

1. The Implicit Hypothesis

The alternative of district power equalizing (DPE), which the plaintiffs in *Serrano* favored, is a concept that has been most forcefully advocated in recent years by Professors Coons, Clune, and Sugarman.[55] It cannot, however, fulfill the requirement of optimum public school resource deployment and should be abandoned as a vehicle for determining the quality of education within the local school districts of California.

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[53] A deviation from mathematically equal representation of 16.4%, we are told, "may well approach tolerable limits." Mahan v. Howell, 410 U.S. 315, 329 (1973). In Gaffney v. Cummings, 412 U.S. 735 (1973), the maximum deviation was 7.83%. While not precisely justified by the state, the Court announced the de minimis standard in White v. Regester, 412 U.S. 755 (1973) (maximum deviation was 9.9%). The Court in *White* said "[v]ery likely, larger differences between districts would not be tolerable without justification . . . ." 412 U.S. at 764.

[54] Among the trial court's findings of fact in *Serrano I* are the following:

"No. 214. The quality of education provided by a school district to its pupils is significantly affected and improved by an increase in per pupil expenditures.

No. 215. The level of expenditures per pupil and the ability of a district to provide a given measure of quality of school offerings are directly related. . . . .

No. 236. The amount of money available to a school district affects the quality of education being offered because facilities, equipment, supplies and services in the form of teachers and other employees, all require expenditures and, if expenditures are restricted because of an absence of funds, the educational program in a district will necessarily be impaired."

There are many laudatory things to be said about DPE, especially when it is compared with the present system of school financing in California and most other states. But notwithstanding plaintiffs' protests to the contrary,[56] DPE focuses essentially upon tax equity (equalization of tax burdens in regard to rate of tax assessed) and not upon the equalization of educational opportunity, the problem involved in *Serrano II*.[57] The hypothesis implicit in the DPE strategy is that if the property tax burden of local voters, measured in terms of the amount of money that can be raised per ADA student for each dollar of tax levied locally per one hundred dollars of assessed valuation (AV) within the school district, is the same for all voters and all school districts throughout the state (regardless of the actual ratio of AV/ADA within a school district), then the local political process and the local concern for adequate training will assure the quality of education[58] within the school districts.[59] This hypothesis is interesting, but the proposed financing system built upon it is rife with shortcomings.

2. The Shortcomings of a DPE Scheme Based on Property Values

One major shortcoming of DPE as a mechanism for removing wealth-related disparities in per-pupil expenditures is the lack of a demonstrably strong correlation between assessed valuation of real property per ADA student and individual wealth.[60] More important, however, DPE simply does not take into account enough different factors to offer a feasible alternative to the evils inherent in the present system of school financing. The main evil to be eliminated is the conditioning of a school child's access to essential public school resources upon his family's or his school district neighbors' individual wealth, not just property wealth.

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[55] *See* J. Coons, W. Clune, & S. Sugarman, Private Wealth and Public Education (1970).

[56] *See* Brief for Respondents at 84-85, Serrano II, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976).

[57] *See* note 23, and accompanying text *supra*.

[58] *See* note 39, and accompanying text *supra*.

[59] *See* Brief of The Childhood and Government Project as Amicus Curiae, Serrano II, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976). "The relevant wealth is always *district* wealth—assessed valuation per pupil. It is the right to public education that is affected, and even the richest individual cannot purchase it. The only purchaser is that state-created entity called the school district whose taxable property per pupil is, therefore, the relevant measure of wealth. Thus, *Serrano* is not a poor man's complaint. The individual poor, to be sure, are the most poignant victims of the present system because they cannot escape to private schools; but the children of families living in poor districts all suffer from under financed schools irrespective of their family's income level." *Id.* at 11 (emphasis added).

[60] *See* notes 14 & 16 *supra*.

The assessed valuation of real property per ADA student is an important term in the calculus of a local school district's revenue production capacity, but it is not the only nor the most important term.[61] District power equalizing does not take into account wealth-related disparities in expenditure that are not property wealth related. It is true, for example, that under the DPE scheme advanced by the amici in *Serrano*,[62] all who own a residence valued at $40,000 would receive for their local schools the same amount of money per ADA student for every dollar of tax assessed per hundred dollars of assessed valuation. But taxes are paid with *individual wealth* (usually personal income), not *property wealth*. Because there is no positive correlation in California school districts between individual wealth and real property wealth, the average ability of local taxpayers in any given district to pay the same level of tax varies widely. It is one thing, for example, to ask a family of four with an annual income of $20,000 and a single family residence assessed at $10,000[63] to pay a school tax of five dollars per hundred dollars AV, but is is quite another matter to ask a similar family with an annual income of only $10,000 to pay the same rate and the same total tax on a $10,000 AV residence, even when the latter is guaranteed through DPE the same revenue per ADA student as that promised to the former.[64]

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[61] For example, in the 1970-71 school year the highest spending unified school district in the grouping of school districts with the lowest ratio of AV/ADA spent more per ADA student than the lowest spending unified school district in the grouping of school districts with the highest ratio of AV/ADA. *See* Defendant's Exhibit L-4, Serrano v. Priest, Civ. No. 938254 (Cal. Super. Ct. 1974). The significance of this statistic is that other factors, unrelated to local school district real property AV/ADA, have a significant effect on local decisions concerning school revenue production.

[62] *See* note 55 *supra*.

[63] In California, real property is assessed for tax purposes at 25% of true value. CAL. REV. & TAX CODE § 401 (West Supp. 1977). Thus, a $40,000 lot would have an assessed valuation of $10,000. Also, "modified assessed valuation" (MAV) rather than "assessed valuation" (AV) is the standard measure of property wealth. *See* CAL. EDUC. CODE §§41200-41206 (West Spec. Pamph. 1976) (formerly at *id.* §§ 17261-17265 (West Supp. 1977)). The "modification" is a device to encourage, through a kind of tax penalty for noncompliance, school districts to become "unified" school districts. Because for present purposes the distinction between MAV and AV is unimportant, that distinction has been ignored in this commentary.

[64] *See* Plaintiff's Exhibit 1 at 95, and Defendant's Exhibit L-1 at 560 and 871, Serrano v. Priest, Civ. No. 938254 (Cal. Super. Ct. 1974). The cited pages disclose the following data:

	MAV/ADA*	MEDIAN FAMILY INCOME
Santa Monica Unified School District	$29,800	$10,800
Palos Verdes Peninsula Unified School District	$12,200	$21,100

* Modified assessed valuation per average daily attendance students (see note 63 *supra*).

This comparison illustrates further the extreme likelihood of continuing wealth-related

It is elementary that a unit of wealth does not have the same value for everyone,[65] nor does one value the last unit of wealth to the same degree as the first. What is most troublesome about this fact in the context of school finance is not only that wealth-based choices under a DPE system would continue to influence strongly local educational resource deployment choices, but also that those most directly harmed by this continuing wealth-based decisional calculus are not the decision-makers but are rather their children.[66]

District power equalizing, which requires majority approval of local residents to obtain a guaranteed revenue, also does not take into account the impact of important community characteristics that affect school support, such as the percentage of the electorate that is unmarried or married but childless, the educational background of the parents of school-age children, or the costs of other local government services.[67] A related prob-

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disparities between school districts in per-pupil expenditures if a DPE system of school financing is adopted. If district wealth were predicated upon the assessed valuation of real property within the district, Santa Monica is nearly 2½ times as wealthy as Palos Verdes Peninsula. Yet, in terms of median family taxable income, Palos Verdes is nearly twice as wealthy as Santa Monica. Under a DPE system, one might expect the relatively richer Palos Verdes residents to be subsidized by the revenues raised at the expense of the poorer Santa Monica residents.

[65] Those with greater disposable income relative to their fixed and irreducible basic expenses place a lesser value on having a relatively large number of dollars that are disposable in a discretionary way than those enjoying less disposable income. Because this is so it cannot be expected that both groups will choose to spend the same number of dollars for education, even if each dollar has the same purchasing power. In fact, the less affluent group would have to accord education a higher priority than the more affluent group in order for the former to make the commitment to spend the same amount of dollars as the latter. For the less affluent, that same amount of dollars would represent a greater percentage of their discretionary disposable income that must be spent for education.

[66] Respondents commented: "Defendants would attempt to treat tax inequity in the abstract as if it can be treated separately from spending inequity but one cannot look at one without looking at the other. Wealth, tax rates, and spending are inextricably tied together. The tax rate is merely the device through which assessed wealth has its impact upon spending, for the lower a district's wealth, the higher its tax rate must be in order to raise a given amount of revenue." Brief for Respondents at 85, Serrano II, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Reptr. 345 (1976). In fact, tax inequity can and should be treated separately from spending inequity (resource deployment). We treat these two concerns quite separately at the federal level. For example, when the federal government is concerned with revenue production through the vehicle of the graduated net income tax the concern is with what graduation structure, what exemptions, etc., are fair for those *producing* the taxable revenue. But these concerns are not confused, as the *Serrano* plaintiffs would require, with the separate subject of how this revenue, once collected, should be distributed. It is true that wealth, tax rates, and spending are inextricably tied together but only in the ultimate sense that unless the government prints its own money, it ought not spend more than it collects.

[67] In the 1970-71 school year, for example, the school districts of Berkeley, Palo Alto and Pasadena were, respectively, the fourth, eighth, and twenty-first highest spending districts per ADA student in California. Yet in rank order of their real property wealth they were, respectively, seventy-fifth, fifty-sixth, and ninety-fifth. Plaintiff's Exhibit 100 and Defendant's Exhibit H-5, Serrano v. Priest, Civ. No. 938254 (Cal. Super. Ct. 1974). The proximity of colleges and universities in the midst of these school districts coupled with their higher than average median family incomes probably explains their extraordinarily high school expenditures, relative to their relatively low real property wealth.

lem of DPE is that to the extent it makes education a matter of local determination, it allows property-rich districts to escape, at least in part, the intended purpose of the financing system, *i.e.*, the removal of local property wealth from the *exclusive* use of the district in which it is found.

District power equalizing also encourages an unintended extension of the definition of education in property-poor districts, an extension subsidized by the property wealth located and taxed elsewhere. One might expect, for example, that property-rich districts would define education narrowly because a portion of the revenues raised for education therein would actually flow to other districts. To minimize this tax dollar drain, a self-serving property-rich district might exclude from its school programs all drama, art, music, physical education, interscholastic competitive sports, science clubs, and foreign language programs that are not mandated by the state and divert the money thereby saved to, for example, local community recreation and park budgets. Such a tactic would permit both local property taxation and local retention of revenues thereby raised, because only school revenues would be district power equalized. On the other hand, property-poor districts that would receive more than one dollar in value for every dollar that they taxed themselves could be expected to expand their definition of education to include more elaborate educational and related programs such as free hot breakfasts, psychological counseling, medical aid, disease inoculation, or dental hygiene. Moreover, in school districts where real property assessed valuation is high relative to the DPE neutral point but where median family income is relatively low,[68] more money would be generated by taxes than would be retained locally, in spite of the fact that the burden on income to raise such revenues in those districts is disproportionately large. This fact could be expected to dampen the enthusiasm in such districts for needed school programs, even to the point that local DPE tax measures might not pass at all.

3. The Shortcomings of a Modified DPE Scheme

Of course, a system of district power equalizing could be devised which is based on median family income per ADA student in a district, or a combination of an income-wealth base and a property-wealth base. But even that modification and improvement should not be used as a device for producing necessary school resources because it, like a real property-based DPE, would only become part of a patchwork solution to the overall school financing problem; school revenue appropriation would continue to be contingent upon the non-school values of local communities. Thus, in communities with a high proportion of single adults, elderly persons, and childless couples, such as San Francisco, the value placed on raising school resources would be less than that exhibited by communities with low proportions of the same demographic subgroups. An income-based DPE would also continue to permit the scope of education to be determined at the local level, and thus would encourage the same sort of definitional manipulation by both income-rich and income-poor districts that exists in a real property-based DPE system.[69]

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[68] See notes 16, 64 and 65 *supra*.

4. DPE and The Problem of Municipal Overburden

Whether a DPE system used real property or income as a wealth criterion or some combination of the two, it would not deal with the serious problem of municipal overburden.[70] In *Serrano II* the plaintiff-respondents argued:

> Appellants assert that a fiscally neutral school financing system in which districts get equal revenue for equal tax effort would be unfair to districts like San Francisco which has high property tax rates for governmental services other than education. This additional tax burden is often referred to as "municipal overburden."
>
> Yet, again, appellants ignore the trial court finding that municipal tax overburden occurs in low wealth, low spending districts just as it does in high wealth, high spending districts ... No reason exists why San Francisco ought to have an advantage over Los Angeles or San Diego from the standpoint of municipal overburden. Both before and after S.B. 90 and A.B. 1267, high wealth, high spending districts are financially better able to address the problem of municipal tax overburden than are low wealth, low spending districts.... That is a complete response to appellant's argument.[71]

In fact, the response is less than complete. It is true that no reason exists why San Francisco ought to have an advantage over Los Angeles or San Diego with respect to municipal overburden, but it is equally true that San Francisco and other high-wealth, high municipal overburden districts should not be unduly penalized by a DPE system. Yet, unless further adjustments are made to the basic DPE model, low-wealth districts with high municipal overburden would enjoy an unfair advantage similar to that now enjoyed by high-wealth, high municipal overburden districts.

District power equalizing cannot solve the problem of municipal overburden. It can only increase the burden for high-wealth districts that already experience it, while decreasing the burden for low-wealth districts. To the extent that the poor are found in high-wealth districts, their problems are further exacerbated by this flaw in DPE. The reason why property-based DPE would intensify the municipal overburden of a high property wealth district with a high municipal overburden, such as San Francisco, is readily apparent. With fierce competition for local tax dollars among other governmental needs, a school district in a community with a high municipal overburden has a difficult struggle to raise needed educational revenues. If the high municipal overburden school district is also a property-rich district, the problem of overburden is less than that confronted in an average wealth or property-poor district because in the property-rich district a school tax of one dollar per one hundred dollars of assessed valuation will buy more resources per ADA student. All other things being equal, this means that the high property wealth district can impose a lower rate of local school tax than a low wealth district could; for this reason, other governmental services may take a disproportionately larger share of a property-rich district's local tax revenues without significantly harming its school program. In other words, being a high property wealth district partially compensates for being a district with a high municipal overburden.

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[69] *See* text accompanying note 67 *supra*.

[70] *See* note 26 *supra*.

[71] Respondents' Brief at 84, Serrano II, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976).

Under a property-based DPE system, however, a high-wealth, high municipal overburden district could not maintain the same level of school spending per ADA student with the same tax rate it had imposed prior to DPE. Thus, in a district such as San Francisco, either total local taxes would have to be increased in an amount corresponding to the assessed valuation discount built into the DPE system, or school revenues (or other governmental revenues) would have to be reduced. On the other hand, low-wealth, high municipal overburden districts existing within a property-based DPE system would compete more favorably with other local governmental tax needs than they do at present, because a lower rate of local school tax would be sufficient to produce the same revenue per ADA student as existed before DPE. Thus, looking to the needs of both high-wealth and low-wealth districts, the serious problem of municipal overburden is not treated any more satisfactorily under a property-based DPE system than it is under the present system of school financing in California.

5. DPE and the Need for Centralized Fiscal Planning

Considered from the perspective of California state fiscal planners, DPE presents further unattractive features. Those having the responsibility for drafting the state's annual budget will be unenthusiastic about DPE because it would be very difficult to forecast how much of the program the state will have to finance from the non-school revenues in the state's general fund. Ideally, the local revenues produced by taxes in high-wealth districts that exceed the amount per local ADA student that the DPE system allows to be retained would be redistributed throughout the state to those low-wealth districts that raised insufficient revenue to meet the amount per local ADA student guaranteed under the DPE system for that tax rate. In such a situation, the state would act merely as a conduit and no additional state revenues would be called upon to meet the DPE guarantee to local school districts.

Unfortunately, California is not the fiscal planner's ideal world. It is impossible to predict from year to year the degree to which the high-wealth districts would produce revenues that could be used by the state to underwrite the shortfall in the low-wealth districts. This uncertainty could require substantial uncommitted reserves in the state general fund to underwrite the DPE program to the extent that it does not internally generate sufficient revenues of its own. Of course, state planners could set the DPE dollar guarantee per local ADA student at a very conservative level to hedge against the state's need to underwrite the DPE program from other state revenues. But such fiscal conservatism would frustrate the collective local desire to allocate resources for public education. As the burden on school revenue production increases, the capacity of taxpayers to bear that burden diminishes. If an additional onus was placed upon local school revenue production in order to hedge against the state's need to supplement the DPE guarantee from other sources, the underlying purpose of DPE would be distorted in order to diminish the large fiscal uncertainty that DPE had created at the state level.

It would be possible for the state to require all school districts to pass their local school tax measures for the succeeding fiscal year in advance, based upon the state's tentative schedule of DPE guarantees for that year. The state could then change the DPE guarantee schedule after all local school district tax rates were promulgated.[72] Under such an arrangement, the state could know what its underwriting costs would be in any given fiscal year before it irrevocably pledged itself to fund the program. If the costs were too great, the state could simply reduce its DPE guarantee to an acceptable level. But such a system would be inadvisable because local school districts could never be confident that their tentative DPE budgets would in fact become their actual budgets. If the state mandated a reduction of the DPE guarantee, all local school budgets would have to be reduced. Such an inherently uncertain financing system is simply impossible to administer.

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[72] The state could also require all local school districts to submit to the state their proposed tax rates so that the state could commit itself irrevocably to a schedule of DPE guarantees. But such a scheme would also be unsatisfactory because there would be no way of knowing in advance which district voters would pass their tax requests and which would not.

D. *Vouchers*

The fifth financing alternative suggested by *Serrano II* is that of vouchers.[73] It is perhaps the least attractive option available to the California legislature. This is so not because it is an alternative without merit but because it would represent the most radical departure from the present system and because it is a largely untested technique in California. Legislators tend to eschew unfamiliar or untried alternatives. For these reasons, a voucher system is unlikely to be adopted.

III. A PROPOSED LEGISLATIVE RESPONSE TO *SERRANO II*

My proposed solution to the problem of school financing in California is a variant of the sixth alternative broached in *Serrano II*, namely, some combination of the other five options. It would consist of both full state funding to meet the basic educational needs of school children and a radically modified system of local power equalizing.

A. *Full State Funding*

The first alternative suggested in *Serrano II*, full state funding, has so many attractive features that it forms the basis of the school financing system suggested here. The imposition of a statewide property tax has much to recommend it[74] because, unlike DPE, it allows for separate and consequently more effective treatment of the two distinct problems in school finance—revenue production and educational resource deployment. Full state funding would also provide reliable, predictable annual revenues because there would be no local voter discretion to approve or disapprove a given taxing measure. Such a financing system would also negate the importance of the location and the value of taxable real property in the state, at least for educational revenue purposes. Moreover, under a system of full funding, the state could simply levy a property tax that would produce all revenues necessary to subsidize the schools. Having collected the revenues under that procedure, the state could then distribute funds to local school districts on the sole basis of need.

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[73] Under a voucher plan, the state would give a student's parents a voucher *i.e.*, a certificate indicating that an approved school may present it to the state and collect cash in the amount shown on its face, that may be used at any designated institution for the cost of the child's education. Under a pure voucher system, schools would receive no funds from the state except those tendered to it as vouchers by parents who chose to enroll their children there. *See generally* C. JENCKS, EDUCATION VOUCHERS (1970); A MORRIS, THE CONSTITUTION AND AMERICAN EDUCATION (1974).

[74] One of the most commonly voiced criticisms of full state funding is the fear that local control will be supplanted. It is said that if local voters cannot determine the amount of revenue produced to maintain and operate their schools, they will lose control over the content, character and requirements of the educational process. This criticism is only partially correct. One of the present political realities is that the constituencies of all school districts want strong local control But these are the same constituencies that elect state legislators. Consequently, it seems unlikely that the state legislature would intrude significantly into the operation of local schools or allow other state agencies to do so. On the other hand, in California the state has an obligation to guarantee the fundamental interest of education and, for this reason, it might legitimately impose upon local school districts. Such an action is an intrusion upon local control, but deference to the concept of local control should not excuse the failure of a school district to provide the minimum educational program its school children need. A child's fundamental interest in an adequate education is undermined both when district voters and the state, acting upon the principle of local control, fail to provide such a program. *Serrano II* would not permit the quality of education to be impaired by the level of district expenditure even if a low expenditure level were approved by the district's electorate. Serrano II, 18 Cal. 3d at 755-56, 557 P.2d at 944, 135 Cal. Rptr. at 360.

Full state funding for the basic educational needs of all students also overcomes many of the other objections raised against district power equalizing. A school district that contains some pupils whose educational needs differ from the student norm in various degrees usually finds that the cost of meeting those needs is disproportionately higher on a per pupil basis than the cost incurred in educating its student population generally. If a system of full state funding were employed to meet the basic educational needs of all students, those additional intradistrict costs could be identified and compensated for in the state revenue distribution formula through which the local school district received its subsidies.[75] If a system for full state funding of the basic educational needs of all students were implemented in California, it would be relatively simple to take into account such important local factors as municipal overburden, regional variations in the consumer price index, differences in personnel experience and expertise,[76] intradistrict transportation requirements,[77] and economies of scale.[78] These factors may be easily and precisely accounted for in fairly disbursing money to a school district where full state funding is employed. Rather than being impaired by such variables, a full state state financing scheme would neutralize their effect on local school resource deployment. Moreover, full state funding of basic educational needs would assure that local communities could not allow their noneducational priorities to supersede the requirement for full support of the basic educational needs of local students.[79]

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[75] One method by which the state might take into account the increased costs attendant to educating students with special educational needs is to "weight" students according to those special needs and provide revenue to local school districts on the basis of its total number of "weighted" students. For example, if the state recognized that students from families below the poverty level had greater educational needs than their peers, students who fit that description could be given an extra numerical weighting—say 0.5. Thus, one such child, assuming he also did not fit additional weighting categories, would count as 1.5 children for the purposes of distributing state funds to his local school district. If the state provided funding to local school districts at the rate of $1,000 per "weighted" pupil, the school district in this example would receive $1,500 for this one student. Another method would be to guarantee full state funding for a certain ratio of staff and nonsalary items per "weighted" student. Whatever the method used, full state funding of a student's basic educational needs would constitute the optimum technique for providing the funding adequate to fulfill the educationally diverse needs of students, wherever they are found.

[76] One of the substantial fiscal burdens that urban and adjacent suburban school districts bear is the high level of experience and professional preparation of their teaching staff. In California, a teacher's salary increases proportionately with the number of years that the teacher has been teaching and the level of formal education achieved by that teacher. Because urban and suburban communities have been viewed as desirable "destination" points by teachers, they tend to retain teaching positions in those communities for durations significantly longer than the statewide average. This means that teacher and administrative salaries in urban and suburban communities have been viewed as desirable "destination" points by teachers, they tend to retain teaching positions in those communities for durations significantly longer than the statewide average. This means that teacher and administrative salaries in urban and suburban school districts are generally higher than the statewide average.

[77] The transportation requirements of school districts vary widely. Districts that are

B. Neighborhood Power Equalizing

In addition to providing fair and reliable means for school revenue production and school resource utilization, the state has a responsibility to assure that school children are being adequately and effectively educated. Members of the local community, however, often demand the authority to fashion and administer local school programs. These two interests can be accommodated through the vehicle of neighborhood power equalizing (NPE).[80]

Once the basic educational needs of all students are assured through full state funding, local luxuries and nonessential programs[81] can be fund-

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relatively compact often have minimal transportation needs. In contrast, rural and sparsely populated districts depend heavily upon busing, which can be very expensive. School districts which are racially segregated may become substantially dependent upon large scale busing.

[78] The smaller and more remote the school district, the higher its per student ADA costs are likely to be. On the other hand, some districts, because they are so large, have diseconomies of scale for the reason that they cannot be managed with optimum efficiency. Each of these problems can be dealt with specifically under a full state funding scheme.

[79] *See* note 73 *supra*.

[80] Under an NPE system, each geographical area within a school district that constitutes the attendance area of a high school (and the elementary, middle, and junior high schools that serve it) would become a separate taxing entity for the purpose of allowing voters in that area to determine whether they wish to tax themselves in order to provide desired, but nonessential, programs for their children. The underlying premise is that a smaller school district unit is better suited to achieve the twin goals of local control and local performance auditing by the state. The neighborhood high school attendance area is probably the smallest taxing district which is practical. A taxing district that separately encompassed elementary, middle, and junior high schools would be overlapped by the larger neighborhood high school serving them, causing an undesirable multiplicity of taxing entities.

The interplay between the state and the neighborhood school is not new in California. The Early Childhood Education (ECE) program in California presently operates in the early primary grades. Under this program, state money is made available to a school building within a district in order to implement some plan agreed upon by the State Department of Education, the neighborhood parents, the teachers, and the school administrators working in that local building. The state then evaluates the performance of that program to determine whether the subsidization will continue. The ECE program gives state authorities direct involvement with neighborhood school operation and allows the individual school wide latitude to implement particular educational programs while simultaneously providing the state with a direct means of influencing local school choices so as to assure more effective learning opportunities for school children.

[81] Precisely what constitutes the "basic educational needs" of students as distinguished from "local luxuries and nonessential programs" is currently a matter of spirited, albeit con-

ed by discretionary local efforts.[82] These nonessential programs, if limited to a fixed percentage of the regular school program budget, can be prevented from seriously distorting the range of programs and educational opportunities offered among school districts.[83] The proposed NPE formula can be mathematically represented as follows:[84]

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fused, debate in the Washington state legislature, which is attempting to carry out the mandate of the trial court in the *Seattle* case. See text accompanying notes 42-47 *supra*. One definitional approach would be to classify students on the basis of their learning potential. Having decided upon appropriate broad classifications, testable substantive skills and levels of competencies that students in each of these categories could reasonably be expected to exhibit at specified grade levels and upon high school graduation could be set. Then, the public school resource deployments (as exemplified by such measures as student/teacher ratios, the number and variety of course offerings and textbooks, the presence of learning resource centers in schools, etc.) that are, on a statewide average, being utilized to foster substantive skills and optimum competency levels in students could be used by the state legislature as a basis for setting levels of funding necessary to provide for the basic educational needs of all school-children. Having determined the numbers of children fitting within each category in each district and the expense of meeting their particular needs, the state could then disburse to each district the amount of revenue necessary to provide for the basic educational requirements of all students in that district. Once the local school district received such state-provided funds, however, it should be under no obligation actually to utilize school resources in any preordained fashion. Rather, the local school district should have the freedom to experiment within its program. Accountability for the effective use of state funds could be maintained by annual state-administered student testing. As long as a local school district's students were progressing in a statistically satisfactory way in terms of their acquisition of skills and proficiency levels, the district would have fulfilled its obligation to spend its state-provided funds wisely, and no further accounting by it would be necessary. Where aggregate student progress in a district does not meet established expectations, further involvement of the state Superintendent of Public Instruction in that district's educational program could be required until student performance levels conform with the requisite criteria; at that juncture, the local district could regain total autonomy over the administration of its programs.

Local luxuries and nonessential programs would comprise those programs and school related experiences which go beyond what is necessary to provide students with the substantive skills and competency levels already established as necessary to prepare them for adult life. Such programs and experiences would, if provided, add to and enrich student education. Their absence would not seriously disadvantage high school graduates as they chose from among the array of further career and life opportunities. Swahili, Swedish, ethnomusicology, calligraphy, film making, pottery, or football, for example, might be characterized as local luxuries and nonessential programs to be funded by locally-voted tax measures in an NPE system.

82. This approach assures that sufficient financial resources will be available to meet the essential educational needs of students, regardless of local sentiment concerning those needs or local desires to tax at a sufficient rate to meet those needs. Only the revenues that would be used for educational programs and services that go beyond the basic educational needs of students would be subject to local voter approval.

83. Where NPE is used, the maximum district percentage of the annual regular program budget could be the base for determining the pro rata share allocable to the neighborhood school within that district. This pro rata distribution could be based upon the ratio of the neighborhood school's ADA students to the district ADA population, or a "weighted" ADA student ratio could be employed. A maximum NPE supplemental budget for a school district might range between ten and twenty percent of the regular district budget that is supported by full state funding.

84. The equation shown is intended merely to illustrate the concept and to show how the important wealth-related factors can be dealt with. There are other terms that could be add-

$$ATY_{x_n} = BTY_{s_n} \cdot \left[\frac{1 + \dfrac{K_1\,(MO_x - MO_s)}{MO_s} + \dfrac{K_2\,(CPI_x - CPI_s)}{CPI_s}}{\dfrac{(AFI/ADA)_x}{(AFI/ADA)_s} \cdot \dfrac{(MAV/ADA)_x}{(MAV/ADA)_s}} \right]$$

In the context of this equation, "ATY_{X_n}" means the actual tax yield in dollars per ADA student for any neighborhood "x" which votes to tax its real property at tax rate "n". "BTY_{S_n}" means the tax yield in dollars per ADA student for the average state school community, having the average state municipal overburden, the average state consumer price index, the average state family income per ADA student, the average state modified assessed valuation per ADA student and taxing its real property at tax rate "n". The term "MO_X" refers to the municipal overburden for neighborhood "x," expressed as the ratio of that neighborhood's total governmental nonschool costs to total governmental costs. This ratio would be the same for each neighborhood within a given school district. "MO_S" refers to the statewide average municipal overburden. The figure "CPI_X" is the consumer price index for neighborhood "x"; this index figure would also be the same for each neighborhood within a given school district. Similarly, the figure "CPI_S" is the statewide average consumer price index. "$(AFI/ADA)_X$" means the average family income per average daily attendance of students in neighborhood "x" and "$AFI/ADA)_S$" is the statewide average modified assessed valuation per average daily attendance. Finally, "K_1" and "K_2" are dimensionless constant coefficients of a numerical value to be determined in applying the NPE formula.

In this equation, a local municipal overburden greater than the state average causes the local actual tax yield to increase beyond the base tax yield; the converse is also true. This relationship between municipal overburden and actual tax yield recognizes the increased onus on districts with high municipal overburden (whether they are high-wealth or low-wealth districts) and compensates for it. It likewise compensates for variations

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ed to the equation to refine it and make it more useful. Also, a sophisticated and more practical equation would probably employ nonlinear coefficients in place of K_1 and K_2, where the coefficients themselves were a function of some of the variable terms in the equation.

It is true that the equation shown above relies upon the average values of independent variables and thus to some extent, like district power equalizing, does not accommodate ideally each voter who makes up those average values. But, unlike DPE, this equation takes into account the many variables that affect the calculus of voter decision-making rather than being limited to only one variable (average real property wealth). More importantly, under the system proposed, the criticisms of DPE (see text accompanying notes 60-72 *supra*), to the extent that they might apply to NPE, become de minimus because NPE-financed school programs are by definition nonessential.

around the state in the consumer price index, recognizing that areas with higher indices need more money to obtain the same value than areas with lower indices. Where income wealth increases as compared to the state average, the equation takes this into account by providing less than the base tax yield. This is a recognition of the fact that those communities with higher income wealth can pay higher effective taxes to obtain the locally desired benefit. Where a community has lower than average income, the equation increases the actual tax yield beyond the base tax yield. The same holds true in the case of real property assessed valuation per local ADA student. Where there is a higher than average local assessed valuation, the actual tax yield is diminished from the base tax yield and vice versa.[85]

California could encourage improvements in the basic educational program in local school districts, which would be fully state funded, by requiring certain educational reforms in the basic program in the neighborhood school as a condition precedent to that neighborhood school's participation in supplemental programs financed by NPE. This interrelationship would achieve and perpetuate an important interchange between local administration and control of education in each school building, and state supervision of and assistance to local schools.

CONCLUSION

The court in *Serrano II* failed to treat the problems of public school revenue production and public school resource deployment separately. As a result, it neglected to analyze fully the issues it faced. In addition, the alternative financing schemes announced by the trial court and adopted by the state supreme court do not, on the whole, offer a sufficient means to resolve the school financing crisis.

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[85] By way of example, suppose the Base Tax Yield for a tax rate of $1.00/$100 assessed valuation was $500 ($BTY_{S_n}$ = $500), constant coefficients K_1 and K_2 had values of 2 and [illegible], respectively, and the remaining state-related variables had the following values:

$MO_S = 1.00$
$CPI_S = 1.00$
$(AFI/ADA)_S = \$5,000$
$(MAV/ADA)_X = \$70,000$

A neighborhood high school taxing district "X" that voted to tax itself for school purposes at the rate of one dollar per one hundred dollars of assessed valuation would have an Actual Tax Yield (ATY_{X_n}) of $665.00 per ADA student (33% higher than the Base Tax Yield), if its Municipal Overburden (MO_X) was 1.20, its Consumer Price Index (CPI_X) was 1.10, its ratio of Average Family Income to Average Daily Attendance $(AFI/ADA)_X$ was $3,000/student, and its ratio of Modified Assessed Valuation to Average Daily Attendance $(MAV/ADA)_X$ was $150,000/student. In another example, a neighborhood high school taxing district "X" that voted a $1.00/$100 assessed valuation tax would have an Actual Tax Yield (ATY_{X_n}) of only $37.50 per ADA student (7.5 percent of the Base Tax Yield) if its MO_X = 0.80; CPI_X^n = 1.10, $(AFI/ADA)_X$ = $20,000; and $(MAV/ADA)_X$ = $210,000.

It should be stressed, however, that these two examples are provided only to demonstrate how the equation might operate to compensate for various levels and kinds of wealth in the neighborhood high school taxing district in an NPE system. The final form of the equation, the numerical values assigned to the coefficient terms, and the schedule of Base Tax Yield for various levels of tax rates could only be determined after a thorough investigation of California tax data.

In responding to the mandate of *Serrano II*, the California legislature should eliminate the "inferior state school,"[86] provide equitable tax burdens, equitable educational opportunities and enhance local control at the most local level—the neighborhood school. These multiple goals can be best achieved by combining, with the indicated modifications, full state funding and local power equalizing. It is this proposal that offers a needed alternative to the device of district power equalizing favored by the plaintiffs in *Serrano II*.

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[86] *See* text accompanying note 3 *supra*.

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*Freedom of Speech Rights of Public School Students**

Kenneth Grinstead
Professor of Educational Leadership
Eastern Michigan University**

INTRODUCTION

On October 20, 1977 about 100 students attending Mott High School in Warren, Michigan marched in front of the building to protest the limited number of parking spaces available for pupils' autos.[1] The incident illustrates that schools are still the focus of significant grieveances, and that student activism, which developed during the past ten years, continues. Demands for judicial review of public school controls on student expressions will occur. The major purpose of this paper is to discuss the legal aspects of public school students' first amendment free speech rights in the school setting. It is important that free speech rights of public school students be treated separately from those of students in higher education and the general public.[2]

Since the mid-1960's, a number of court cases have been filed by public school students and their parents alleging that school officials and at least one court interefered with their free speech rights. These cases, together with several articles and monographs,[3] provide substantial guidance to students, parents and school officials in determining the parameters of students' speech rights in the school setting.

CONSTITUTIONAL FOUNDATIONS

The United States Supreme Court, in four particularly significant decisions, has to a large extent resolved the interplay among the schools, the courts and the Constitution by recognizing students' rights. *Brown v.*

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*This paper does not include school-sponsored papers or underground newspapers.

**With editorial assistance by Diane Dufek.

[1] Royal Oak Tribune, Royal Oak, Michigan, Oct. 20, 1977, at 1.

[2] Tinker v. Des Moines Sch. Dist., 393 U.S. 503 (1969); Grayned v. City of Rockford, 408 U.S. 104 (1972); Butts v. Dallas Independent Sch. Dist., 436 F.2d 728 (5th Cir. 1971).

[3] *See* Gyory, *The Constitutional Rights of Public School Pupils*, 40 Fordham L. Rev. 201 (1971); *Recent Developments*, 45 Fordham L. Rev. 1236 (1977); *Constitutional Law*, 55 Texas L. Rev. 511 (1977).

Board of Education[4] emphasized children's rights when segregated schools were held to deprive black children of the equal protection of the law. The Court, in *In re Gault*,[5] said that children are entitled to certain due process protections in juvenile proceedings. In *Goss v. Lopez*,[6] due process was extended to school settings. The most notable Court decision involving free speech rights was *Tinker v. Des Moines School District.*[7] This case provides the best definitive statement regarding students' free speech rights to date.[8] *Tinker* marked a major turning point in the application of constitutional standards to educational institutions. The Court held in *Tinker* that a regulation prohibiting the wearing of black arm bands at school and providing for the suspension of any student refusing to remove the arm band was an unconstitutional denial of a student's right of expression of opinion, absent any facts presented by school officials which might reasonably have led them to forecast "substantial disruption of or material interference" with school activities, and absent any showing that disturbances or disorders in fact occurred.

Tinker makes certain premises absolutely clear. The wearing of an arm band for the purpose of expressing certain views is the type of symbolic act that is protected by the free speech clause of the first amendment. Symbolic speech is afforded the same first amendment protection as pure speech. The wearing of arm bands (symbolic speech) is "closely akin to pure speech." Undifferentiated fear or apprehensions of disturbance is not enough to warrant a denial of the right to freedom of expression. School property may not be declared off limits for the expressive activity of students. The burden of proof is on school officials to show reason which might reasonably have led them to foresee "substantial disruption of or material interference"with school activities.[9] Finally, "conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classroom work or involves substantial disorder or the invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech."[10]

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[4] 347 U.S. 483 (1954).

[5] 387 U.S. 1 (1967) (when a juvenile faces criminal commitment to a state insitution, due process requires written notice, right to counsel and the opportunity to confront and cross-examine witnesses).

[6] 419 U.S. 565 (1975).

[7] 393 U.S. 503 (1969).

[8] First amendment rights originally developed in non-educational contexts. Litigants, until *Tinker*, encountered significant obstaacles in claiming these rights on behalf of school children.

[9] The term "substantial disruption or material interference" should be treated as a flexible rule dependent on the totality of facts in each case. Karp v. Becken, 477 F.2d 171 (9th Cir. 1973). The *Tinker* Court borrowed the phraseologies of the rule from the Fifth Circuit decision, Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966) and the term appears to have been derived from the often used term of "clear and present danger."

[10] Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 513 (1969).

The Court in *Tinker* found that the wearing of arm bands was entirely divorced from any actually or potentially disruptive conduct. *Tinker* did not involve aggressive, disruptive action or group demonstrations. *Tinker* did not concern speech or action that intruded upon the work of the school or the rights of other students. There were no threats or acts of violence on school premises. Fear of disruption did not motivate the prohibition of the arm bands. The regulation was directed against the principle of the demonstration itself and students were dismissed solely because they wore the proscribed arm bands.

Tinker recognizes the special need for discipline and decorum in the school environment, indicates the weight to be given such considerations, and formulates a test to be applied when the free speech of students conflicts with the basic purpose of the school. The decision recognizes that expressive activity cannot take priority over customary and primary use of the school.

In *Tinker*, the black arm band as silent and passive communication, commanded attention for the speaker without injuring the school's interests and appealed to the intellect much as verbal speech does.

In arriving at its decision, the *Tinker* court referred with apparent approval to *Burnside v. Byars*[11] and *Blackwell v. Issaquena County Board of Education,*[12] companion cases of the Fifth Circuit Court of Appeals. Both of these cases involved a prohibition against wearing SNCC buttons by students.

In the *Burnside* case, as an exercise of free speech, students were held to be entitled to wear buttons with the inscription "ONE MAN ONE VOTE" around the perimeter and "SNCC" inscribed in the center, notwithstanding the school authority's order to take them off. There had been no previous rule of general application prohibiting the wearing of all buttons, nor did the wearing of buttons cause any present or past disturbance. In holding that the school authorities were required to allow the buttons to be worn, the court said: [I]t appears that the presence of the "freedom buttons" did not hamper the school in carrying on its regular schedule or activities; nor would it seem likely that the simple wearing of buttons unaccompanied by improper conduct would ever do so . . . If the decorum had been disturbed by the presence of the "freedom buttons," the principal would have been acting within his authority and the regulation forbidding the presence of the buttons on school grounds would have been reasonable.[13]

In the *Blackwell* case, buttons were worn with SNCC around the perimeter and a black and white hand joined together, a seemingly innocent invitation to friendship between blacks and whites. The buttons' original appearance in the school and the wearing of them by many after the school board had forbidden it caused serious commotion. Students were suspended and they and their parents sought to have the school authorities enjoined from forbidding the wearing of the button. The injunction was denied and the prohibition was upheld on the grounds that the button caused trouble. The conduct, described as "all hell broke loose," was found to be directly tied to the wearing of the buttons.

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[11] 363 F.2d 744 (5th Cir. 1966).

[12] 363 F.2d 749 (5th Cir. 1966).

[13] Burnside v. Byars, 363 F.2d 744, 748 (5th Cir. 1966).

Following the *Tinker* decision, a number of decisions have been handed down by federal courts concerning public school students' first amendment rights. The following review of cases is intended to describe the current legal status of students' free speech rights.

POST-*TINKER* VIETNAM WAR-RELATED CASES

One of the first post-*Tinker* decisions was an almost identical black arm band case, ***Butts v. Dallas Independent School District.***[14] Several students in the Dallas schools sought to demonstrate their opposition to United States military involvement in Southeast Asia on Vietnam Moratorium Day, October 15, 1969, by wearing black arm bands. School authorities decided that the wearing of black arm bands would be disruptive.[15] Acting under a long-standing policy prohibiting the wearing of attire of a disruptive nature, school officials requested students wearing the arm bands to remove them. Several complied. Those who did not were asked to leave school. The students requested the court to enjoin the district from enforcing the arm band prohibition.

As in Des Moines, the action of school officials in Dallas to prohibit the wearing of black arm bands was unsuccessful. The court found that the "no arm band policy" was ad hoc for the occasion and the long-standing policy which the school relied upon to prohibit the wearing of the arm bands was originally promulgated to curb social clubs, *i.e.*, fraternities, sororities and secret societies. The court found that the arm band wearing was political in nature and, therefore, the "no social club rule" was inapplicable.

As to the nature of the prospective disruption, school officials testified that they did not expect the wearers of the arm bands to initiate the disruption but they believed that the arm bands would incense nonparticipating students. The court agreed that school authorities had a duty to consider the possibility of a disruption and they were not necessarily required to wait until a disruption occurred. However, the court held that the expectation of trouble per se could not justify the arm band prohibition. Something more is required to establish that the arm bands would cause disruption than the pronouncement of the school superintendent. The court then addressed itself to a definition of an acceptable prohibition:

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[14] 436 F. 2d 728 (5th Cir. 1972).

[15] Students had worn other "peace symbols" prior to October 15, 1969 without evoking any administrative concern. Soon after October 15th, a student appeared at school wearing a large "swastika" necklace and a similar symbol emblazoned on his jacket. He was removed from school.

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> What more was required at least was a determination, based on fact, not intuition, that the expected disruption would probably result from the exercise of the constitutional right and that foregoing such exercise would tend to make the expected disruption substantially less probable or less severe.[16]

Shortly after *Tinker*, the courts were faced with a Vietnam war-related free speech issue in *Guzick v. Drebus*,[17] involving a button, rather than black arm bands. In 1969, a student named Guzick, attending Shaw High School in East Cleveland, Ohio, was suspended for refusing to remove a button with the inscription:

April 5 Chicago
GI - Civilian
Anti-War
Demonstration

Guzick sued for injunctive relief and damages. A long-standing rule forbade the wearing of buttons, badges, scarves, etc. whereby the wearers identified themselves as supporters of a cause or which bore messages unrelated to education. The rule had its genesis at the time high school fraternities were in vogue and was promulgated to reduce divisions, competition, and disruptions in the educational process. Buttons, pins and other emblems had been used as identifying badges to represent, define and depict the actual division of the students into various groups.

The rule was continued as one with universal application and usefulness and had been utilized to prevent racially motivated symbols and slogans. The student population at Shaw High School was 70 percent black and 30 percent white. Students had attempted to wear buttons and badges expressing inflammatory messages such as "White is right;" "Say it loud, Black and Proud;" and "Black Power." As indicated by the evidence, if permitted the wearing of the buttons would have led to substantial racial disorder at Shaw High. For example, a fight resulted when a white student wore a button which read "Happy Easter, Dr. King." (Martin Luther King was assassinated during the Easter season.)

The court distinguished the *Guzick* case from *Tinker*. Shaw's "no symbol rule" was not an ad hoc rule but was long-standing and had a history of uniform enforcement.[18] The *Tinker* rule was ad hoc, specifically preventing the wearing of arm bands, a symbol exhibiting opposition to the Vietnam war. Other political symbols had been worn in the Des Moines school without interference. For example, some students had worn the Iron Cross. In *Tinker*, there was an absence of uniform enforcement of a "no symbol rule." In *Tinker*, there was no history of disruption nor any reason to believe that a serious disruption would occur. In *Guzick*, there was ample evidence that the wearing of symbols and buttons had caused substantial disruption. The *Guzick* court concluded that students could be prohibited from wearing badges in school indicating their respective disagreements if the badges provoked confrontation with their fellows and their teachers.

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[16] Butts v. Dallas Independent Sch. Dist., 436 F.2d 728, 731 (5th Cir. 1971).

[17] 805 F. 2d 594 (6th Cir. 1970), *cert. denied*, 91 S. Ct. 941 (1971).

[18] To stop the wearing of Vietnam-related button messages, the Sixth Circuit Court accepted a long-standing school rule first promulgated to prohibit fraternity-related symbols

Guzick's button was unrelated to either fraternities or race but nevertheless could be prohibited. The court pointed out that permitting school authorities to allow some buttons and not others would place an unbearable burden of selection and enforcement on the school authorities.

In the case of *Hill v. Lewis*,[19] a school prohibition against the wearing of arm bands was sustained under conditions again factually distinguishable from *Tinker*. The 71st High School in Cumberland County, North Carolina is located about four miles from the Fort Bragg Military Reservation and is within eight miles of Pope Air Force Base. In October, 1969, the high school had 1,653 students enrolled, 636 (38 percent) were children of a parent on active military duty, and an additional 264 (16 percent) were children with a parent who was a federal employee. The court found these demographic facts relevant, to a reasonable assumption that many of the students supported the national war effort.

The principal of the high school suspended a number of students for wearing arm bands. At least three different viewpoints were represented by groups wearing black arm bands; red, white and blue arm bands; or white arm bands with red peace symbols. Some students wore black gloves or black scarves. On October 15th, 1969 at 8:15 a.m., the starting time for classes, several groups of students partially blocked hallways, formed haphazard columns, and moved slowly and noisily down the halls.

Throughout the day, students were given the option by teachers, following the principal's directive, of removing the arm bands or going to the principal's office. Most complied with the teachers' requests.

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and later used to curtail use of race-related buttons and badges. However, the court would have probably accepted an ad hoc rule in this case. It said, "Surely those charged with providing a place and atmosphere for educating young Americans should not have to fashion their disciplinary rules only after good order has been at least once demolished." *Id.* 305 F. 2d at 600.

[19] 323 F. Supp. 55 (E.D.N.C. 1971).

At least one class was disrupted to the extent that law enforcement officials were called.

The court, in sustaining the student suspensions and the principal's action, found substantial evidence which reasonably led to the forecast of "substantial disruption and material interference with school activities" and infringement upon the rights of other students. The situation was described as "explosive" and "volatile" with the fear of fights and disorders. In upholding the student suspensions, Judge Butler stated:

> Surely, their constitutional right to an education under school conditions conducive to that end must be paramount to any rights of those who would disrupt the process. In the balancing of the First Amendment rights the duty of the State to operate its public school system for the benefit of *all* its children must be protected even if governmental regulations incidentally limit the untrammeled exercise of speech, symbolic or otherwise, by those who would impede the education of those who desire to learn. The interest of the State is superior to the rights of the protestants.[20]

Tinker, Guzick, Butts and *Hill* are Vietnam War-related cases involving the wearing of buttons or arm bands. In *Church v. Saline School District*,[21] long hair was the symbolic form of Anti-Vietnam war opposition. As a form of symbolic expression, long hair can be analogous to the black arm bands worn by students in *Tinker v. Des Moines School District*.[22] The *Church* case, decided in 1972, illustrates the positive application of first amendment rights to students' hair styles.

A male student in a Saline, Michigan school was suspended for wearing long hair in direct violation of a school dress code that specifically defined

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20. *Id.* at 59.

21. 339 F. Supp. 538 (E.D. Mich. 1972).

22. Some disagreement related to this matter may have resulted from a statement in *Tinker:* "The problem presented by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style or department. *Cf.* Ferrell v. Dallas Independent School District, 392 F.2d 697 (C.A. 5th Cir. 1968); Pugsley v. Sellmeyer, 158 Ark. 247, 250 S.W. 538, 30 A.L.R. 1212 (1923)." Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 507, 508 (1969). The *Ferrell* court said: "We shall assume, though we do not decide, for the purpose of this opinion that a hair style is a constitutionally protected mode of expression." Ferrell v. Dallas Independent Sch. Dist., 392 F.2d 697, 702 (5th Cir. 1968). Later, in Breen v. Kahl, 419 F.2d 1034, 1036 (7th Cir. 1969), the court stated: "The right to wear one's hair in any desired manner is an ingredient of personal freedom protected by the United States Constitution." In Stevenson v. Wheeler Board of Education, 306 F. Supp 97 (S.D. Ga. 1969), plaintiff asserted that a constitutionally protected right to express one's individuality (facial hair in this case) was involved. The court, basing its decision on *Tinker* stated that "the highest court indicated that hair style may be distinguished from other forms of expression and that it is not a direct, primary First Amendment right." No hair style case has been decided by the U.S. Supreme Court. *See* Bishop v. Colaw, 450 F.2d 1069, 1071 (8th Cir. 1971), for history of denials cited therein. The circuit courts are divided on the question of the constitutional right to wear one's hair as one pleases.

permissible hair length. The student invoked the federal court's jurisdiction under 42 U.S.C. § 1983 and alleged that the dress code infringed upon his constitutional right of freedom of speech guaranteed by the first amendment. He claimed he was symbolically expressing a political viewpoint by presenting a visible symbol of his opposition to the Vietnam War and no danger of violence or other impediment to school activities existed. He knew his long hair would have a communicative effect and would be identified as opposition to the war. Secondly, he claimed that he allowed his hair to grow in opposition to the school dress code which he described as an expression of the Saline community's intolerance of dissent. The student stated that his action paralleled that of his father. The record indicates that the student's long hair deviated rather dramatically from hair styles of the time (1970), and there was a substantial negative reaction among social acquaintances and classmates. However, there was no danger of violence or other impediment to school activities.

The court found that the student had not decided to grow the long hair as a whim or to keep in step with current fashion trends. He did so with a clear communicative intent which was perceived by those to whom it was directed as a symbol of political expression. Accordingly, the dress regulation was held unconstitutional, as applied to this student and others similarly situated.

The court held that the rule could not be enforced against any students in the Saline High School in light of the peculiar circumstances present. In the opinion of the court, the school authorities offered no acceptable educational justification for the regulation. It was found that the rule had a "chilling effect" on first amendment rights of free speech and thus, could not be enforced.

POST-*TINKER* RACE-RELATED CASES

After *Tinker*, the courts were asked to review decisions of school districts which prohibited buttons or clothing conveying race-related messages.

In *Melton v. Young*,[23] the court was asked to decide whether a public school regulation forbidding students from wearing "provocative symbols" upon their clothing, under penalty of suspension, was a violation of the first amendment. The specific regulation provided: "Also, provocative symbols on clothing will not be allowed." In another section of the regulations, Confederate symbols were barred from use as school symbols.

A student had been suspended for wearing a shoulder patch replica of the Confederate flag. The school principal construed the words "provocative symbols" to mean "that which would cause a substantial disruption of the student body." The court held that precision and specificity are essential to the validity of a public law or regulation affecting freedom of speech if the law or regulation is to pass constitutional muster. The court noted that no where in the school's regulatory scheme were the words "provocative symbols" defined. The term was held to be too vague, broad, and imprecise to be allowed to stand. *Tinker* held that limitations on the use of symbols, or other activity closely akin to pure speech, are permissible only in carefully restricted circumstances. The prohibition of all "provocative symbols" was found to be clearly beyond these restrictive bounds.

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[23] 465 F. 2d 1332 (6th Cir. 1972).

However, the court in *Melton* further found that the validity of the principal's action in ordering the removal of the emblem, or in suspending the plaintiff for his refusal to remove it, is not dependent upon the validity of the regulation. There was overwhelming evidence that the Confederate symbol had been the cause of a very serious, substantial disturbance in the school during the previous year. The principal had every right to anticipate that a tense racial situation would continue to exist in the high school and that repetition of the previous year's disorders might recur if student use of the Confederate symbol was resumed. Consequently, the court held that the restriction on the wearing of the Confederate symbol, under the circumstances, did not violate the first amendment.[24]Its prohibition permitted school authorities to stave off any potential danger resulting from wearing the Confederate flag patch.

In a *Tinker*-type, race-related case, two factually related, but legally distinct issues were disposed of in *Augustus v. School Board of Escambia County.*[25] The first issue involved the effects of school use of officially-approved symbols. The second issue involved the effects of the private use of the symbols by students while attending school.

School authorities in Escambia County, Florida had sanctioned student chosen use of the name "Rebels" as the official name of the high school, use of the Confederate Battle Flag as a school symbol, and the singing of *Dixie* at school functions. Plaintiffs (all black students attending the high school) alleged that the use of the symbols represented symbolic resistance to the court's prior order requiring the maintenance of a unitary school system, that the symbols generated a feeling of inequality and inferiority among black students, and that the symbols were a cause of violence and disruption in the school.

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[24] The district court judge embraced the concept enunciated in Guzick v. Drebus, 431 F. 2d (6th Cir. 1970), that under certain circumstances ad hoc rules are acceptable. He stated, "A public school principal is responsible for maintaining such discipline and order within the school as will permit the educational processes to be carried out. His plenary authority in this regard is not dependent upon the adoption of a written code of student conduct in each school, although the latter may be the desirable practice." Melton v. Young, 328 F. Supp. 88, 97 (E.D. Tenn. 1971). The circuit court agreed stating that "the District Court apparently felt that the suspension was nevertheless valid for the reason that the suspension would have been a legitimate exercise of the school officials' inherent authority to curtail disruption of the educational process even in the absence of a regulation. This Court agrees with the District Court finding." Melton v. Young, 465 F.2d 133, 1334 (6th Cir. 1972).

[25] 361 F. Supp. 383 (N.D. Fla. 1973).

The court found that the symbols had become expressions of white racism, in general, and were offensive to a substantial number of black students. The court held that the Confederate Battle Flag emblem was deliberately worn by white students for the purpose of offending black students. Consequently, the school board was enjoined from permitting the use of the name "Rebels" and from permitting students to display or wear the Confederate Battle Flag while at school or while attending a school-sponsored activity. The court concluded that the symbols must be removed because they were adversely affecting the maintenance of a unitary school system.

The court's injunction was challenged.[26] Several persons intervened on behalf of themselves and taxpayers alleging that they had not used any of the symbols in the manner described and that they were being denied their first amendment rights by the court order. Specifically, the students claimed that they had a first amendment right to choose whatever symbols they wanted unless the choice was prompted by impermissible motives. Relying upon the *Tinker* pronouncement, the court held that the use of the Confederate Battle Flag by individual students was a source of violence and disruption which would continue unless the symbol was no longer worn.[27] Consistent with its previous order enjoining use of the symbols, the court held that the symbols were used to provoke black students. The court stated, "In this situation, the use of the symbols is not unlike the 'fighting words' condemned in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S. Ct. 766, 86 L Ed. 1031 (1942), and is especially dangerous in light of numerical strength of the white students at this school."[28]

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[26] One point of distinction to be made between this case and the others in this article is that the restrictions imposed flowed directly from the court, rather than from the school board. However, the distinction did not change the result.

[27] It appears that the principal focus of such a ruling is the operational result of the acts rather than any discriminatory motive. Augustus v. School Bd. of Escambia County, 361 F. Supp. 383, 388 (N.D. Fla. 1973).

[28] *Id.* at 389. States are free to ban the simple use of so-called "fighting words" without a demonstration of additional justifying curcumstances. "Fighting words" are those personally abusive epithets which when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke reaction. The term "fighting words" has been defined as follows: "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the . . . insulting or fighting words—those which by their very utterance . . . incite an immediate breach of the peace. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). In *Chaplinsky*, the appellant had been convicted for violating a state statute by stating, "You are a God damned racketeer" and "a damned fascist and the whole government of Rochester are fascists or agents of fascists." The New Hampshire court provided a description of words so offensive as to be "fighting words": The word "offensive" is not to be defined in terms of what a particular addressee thinks . . . The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. The English language has a number of words and expressions which by general

Race-related symbols were at issue in *Banks v. Muncie Community Schools.*[29] Black students in Muncie, Indiana claimed that use of certain school symbols violated their first amendment rights to free speech. The school flag resembled the Confederate Flag, athletic teams were named "Rebels," the glee club was called the "Southern Aires" and the homecoming queen was called "Southern Belle." Plaintiff-black students alleged that use of the symbols was offensive to blacks, was inflammatory, and had discouraged blacks from participating in various extra-curricular activities. The court found no merit in the argument that the holding in *Tinker* precluded a school from compelling minority pupils to endure offensive official symbols at a tax-supported institution which they are compelled to attend. The Seventh Circuit Court of Appeals held that the record contained no evidence that black students' rights of free speech and expression were abridged by use of the Confederate symbols and there was no violence in this case.

A post-Tinker race-related case involving Mexican-Americans is *Hernandez v. School District Number One, Denver, Colorado.*[30] The court held that the suspension of high school students of Mexican descent for wearing black berets was not a violation of their constitutional rights to free expression when the students had engaged in disruptive conduct. The student-plaintiffs had requested permission to wear the berets as symbols of Mexican culture and unity, of their dissatisfaction, and of their desire to improve their treatment. The principal, himself of Mexican descent, gave permission to wear the berets experimentally. However, the plaintiffs did engage in conduct that disrupted the school, its educational processes and discipline. Wearers of the black berets became arrogant and boisterous. The beret was used by the plaintiffs as a symbol of their power to disrupt the school. Plaintiffs walked in the school hallways during class-time talking in loud voices and occasionally shouting "Chicano Power." They blocked hallways, refused to give their names to teachers, once attempted to interfere with a disciplinary action, caused by disturbance in the lunchroom, insulted teachers and were involved in other acts

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consent are "fighting words" when said without a disarming smile . . . Such words, as ordinary men know, are likely to cause a fight. So are threatening, profane or obscene revilings. *Id.* at 573. If a school administrator can reasonably foresee that offensive symbols or words worn by students on clothing might cause others to rise up to commit a violent act against the wearer, the symbols or words can be prohibited. The difference between merely unwise or unpopular language and "fighting words" is well recognized in first amendment cases. For example, black arm bands are not per se akin to "fighting words."

[29] 433 F.2d 292 (7th Cir. 1970).

[30] 315 F. Supp. 289 (D. Colo. 1970). An issue raised in this case was the validity of a school regulation requiring that distribution of leaflets or literature on school premises have prior approval of the principal. The plaintiffs refused to obey this regulation. However, the court found that the students' suspensions resulted from the principal's order to stop wearing or displaying berets. Reinstatement was not conditioned on non-distribution of the leaflets but was related to the berets. Therefore, issues relating to the validity of the leaflet distribution regulation were not resolved.

of disturbance. The court found that the conduct of the plaintiffs in this case was disruptive and not immunized by the constitutional guarantee of free speech.[31]

Another case involving protests by Mexican-Americans is *Aguirre v. Tahoka Independent School District*[32] in which a school board's ad hoc regulation, promulgated to prohibit the wearing of arm bands, was questioned. On February 12, 1970, a number of students wore brown arm bands to school as an expression of their dissatisfaction with certain educational policies and practices in the Tahoka school system. The arm band wearers were mostly of Mexican-American descent. On February 13, 1970, the school board issued a supplement to the existing student handbook stating that "any act, unusual dress, coercion of other students, passing out literature, buttons, etc., or apparel decoration that is disruptive, distracting, or provocative so as to incite students of other ethnic groups will not be permitted." A procedure for suspending students for violating the rule was approved at the same time.

The court held that the facts "put this case on all fours" with *Tinker* and that decision controlled. Nothing could be shown to justify material and substantial disruption.

Two cases have been reported involving the use of signs by public school students to convey messages on school grounds. In the first case, the Ninth Circuit Court of Appeals held that a student could be required to surrender potentially disruptive signs but he could not be prevented from bringing them on campus or punished for doing so.[33]

An Arizona high school student, Steven Karp, was suspended from school for bringing signs onto campus protesting the refusal of the school to renew a teacher's contract. The student refused to surrender the signs, asserting a constitutional right to have and distribute them. Upon a second request, he surrendered the signs and agreed to accompany the vice-principal to the administrative office. While the student was in the office, other students began chanting. Pushing and shoving began outside the office. The demonstration ended shortly thereafter.

School administrators suspended student Karp for five days but offered to reduce the suspension to three days if he would agree to refrain from bringing similar signs on campus. He refused. School officials testified that they feared the provocation of an incident, including possible violence, and that they took the signs from the student in order to prevent such an occurrence. The court agreed that the facts substantiated the reasonableness of the forecast of material interference with the school's work and the confiscation of the signs was justified.

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[31] The record reveals that Principal Shannon was unusually cooperative in granting the requests of the beret-wearing students to conduct their activities despite the fact that during the previous spring, a demonstration at another Denver high school resulted in violence, destruction of property and a confrontation between students and police.

[32] 311 F. Supp. 664 (N.D. Tex. 1970).

[33] Karp v. Becken, 477 F.2d 171 (9th Cir. 1973).

However, the court held the five-day suspension impermissible since it was imposed for bringing the signs on campus, an activity constituting pure speech rather than conduct. No substantial disruption could properly be forecast after the signs had been surrendered. In holding that the suspension was not justified, the court stated:

> We have already held that school officials may curtail the exercise of First Amendment rights when they can reasonably forecast material interference or substantial disruption. However, for discipline resulting from the use of pure speech to pass muster under the First Amendment, the school officials have the burden to show justification for their action. Here they failed to do so. Absent justification such as a violation of a statute or school rule, they cannot discipline a student for exercising those rights. The balancing necessary to enable school officials to maintain discipline and order allows curtailment but not necessarily punishment.[34]

At issue in the second sign activity case, *Grayned v. City of Rockford*,[35] was a conviction under a city ordinance which prohibited certain kinds of expressive activity by members of the public on public sidewalks adjacent to a school. The city of Rockford, Illinois convicted Richard Grayned for demonstrating in front of the high school in violation of an anti-noise ordinance which read, in pertinent part, as follows:

> [N]o person, while on public or private grounds adjacent to any building in which a school or any class thereof is in session, shall willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof.[36]

The Court made it clear that expressive activity by members of the public, on the public sidewalk adjacent to the school, may not be declared off-limits unless it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."[37]

The Court was careful to point out that it was upholding an ordinance prohibiting some picketing which was neither violent nor physically obstructive. The justification in this situation had a direct relationship to the school setting. The Court stated, "Noisy demonstrations which disrupt or are incompatible with normal school activities are obviously within the ordinance's reach. Such expressive conduct may be constitutionally protected at other places or other times . . . but next to a school, while classes are in session, it may be prohibited."[38]

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[34] *Id.* at 176.

[35] 408 U.S. 104 (1972).

[36] *Id.* at 107-108.

[37] *Id.* at 118.

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REFUSAL TO PARTICIPATE IN FLAG SALUTE—A PROTECTED FIRST AMENDMENT RIGHT

It now appears to be settled law that students cannot be required to participate in a school-sanctioned flag salute.[39]

Theodore Goetz, an honor student and president of his senior class, refused to participate in the pledge of allegiance. he was offered the option of either leaving the room or standing silently during the pledge ceremony. Goetz claimed he had a first amendment right to stay in the room and remain seated. The federal district court enjoined the school officials from suspending Goetz.

The circuit court first addressed the option given Goetz of standing in silence and cited *West Virginia Board of Education v. Barnette*[40] wherein the U.S. Supreme Court noted that the state might demand other "gestures of acceptance or respect: . . . a bowed or bared head, a bended knee"[41] and reiterated that the state may not compel students to affirm their loyalty by "word or act."[42] The court in Goetz found that standing was no less a gesture than the salute or words of utterance and therefore, it held that the option of standing in silence was an act that cannot be compelled.

The option of leaving the classroom during recitation of the pledge was also rejected by the court. Citing *Barnette* again, the court held that if a state cannot compel participation in the pledge, it cannot punish nonparticipation. The school officials argued that the conduct of Goetz violated the rights of other students and argued that *Tinker* does not protect conduct that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." The record indicated that 25 of Goetz's 30 classmates were not disturbed by his actions. The other five could not be contacted.

STUDENTS' RIGHTS TO RECEIVE INFORMATION (RIGHT TO KNOW)

A recent development in constitutional law has been the emergence of a distinct first amendment right of school students to receive information. The concept of the secondary school as a free marketplace of ideas applies not only to freedom of expression, set forth in *Tinker*, but also to the

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[38] *Id.* at 120.
[39] Goetz v. Ansell, 477 F.2d 636 (2d Cir. 1973).
[40] 319 U.S. 624 (1943).
[41] *Id.* at 632.
[42] *Id.* at 642.

"right to know." Previously this concept had never been recognized in the high school context.

In the case of *Minarcini v. Strongsville City School District,*[43] the Board of Education in Strongsville, Ohio rejected the recommendation of its English Department faculty to purchase certain books for use as high school texts[44] and voted to remove existing copies from school libraries. High school students brought a class action suit against the Board, individual Board members and the school superintendent. The suit was brought under 42 U.S.C. § 1983 (1970). The student claimed that the arbitrary Board actions operated as a prior restraint on their first amendment rights to freedom of speech. The students also alleged that their academic freedom to learn and their fourteenth amendment rights to due process and equal protection had been violated. The district court dismissed the complaint, holding that the Board's actions neither inhibited classroom discussion nor violated any constitutional right.[45] The circuit court agreed that teachers had not been prevented from discussing the books in class, and that, in the area of textbook selection, the Board had properly exercised its authority. No constitutional violation was found in the Board's decision not to approve or purchase certain texts for use in the curriculum.[46] The circuit court reversed the district court's finding that the Board had similar authority to control library content. The circuit court observed that the Board's action in removing the books *Catch 22* and *Cat's Cradle* from the school library was, in itself, neutral in first amendment terms, but an inference could be drawn from reviewing the record that the Board was motivated by a desire "to censor" library content. The circuit court based its decision squarely on a student's first amendment "right to know" and ordered that the books be replaced in the school libraries. The court stated that once a school board creates the privilege of a library, it may not censor the contents of that library according to the social or political tastes of the board members. An existing library becomes a resource in the "free marketplace of ideas" to which students acquire a constitutionally vested right. This right to receive information limits school board censorship power.

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[43] 541 F.2d 577 (6th Cir. 1976).

[44] J. Heller, Catch 22 (1955); K. Vonnegut, Cat's Cradle (1971).

[45] Minarcini v. Strongsville City Sch. Dist., 384 F. Supp. 698 (N.D. Ohio 1974).

[46] Prior to *Minarcini*, the only case that had addressed school board censorship of preexisting library books was President's Council v. Community School Board, 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972). The *President's Council* court ignored the "student's right to receive information" concept. At this writing, a library contents case is in progress in Boston, as described in *Poem on Sexism Stirs Row in High School*, Detroit News, Nov. 6, 1977: Boston—(AP)—School officials in a small New England town have decided that a poem about men ogling women on the street is not fit for high schoolers to read—even though it was written by a 15-year-old girl. The high school's librarian has taken the issue to court, claiming that officials do not have the right to remove a book from the library after it is accepted by a librarian. And students and parents have been packing the federal court in Boston since the trial started Wednesday. The controversy began last July, when the School Committee in Chelsea, on the northern edge of Boston, was informed of a content of a 21-line poem called "The City to a Young Girl." The poem, part of an anthology of verse by teen-agers, describes in earthy language the girl's disgust at being appraised as a "piece of meat" by men on the street. In one passage, she described the city as: "One million horny lip-smacking men; Screaming for my body." The committee ordered librarian Sonja Coleman to clip that poem from the book or remove the entire book, entitled "Male and Female Under 18." She removed the book, but with some supporters formed a group called the Right to Read Defense Committee, which asked the federal court to restore the book to the shelves. In August, Judge Joseph L. Tauro ordered the book temporarily put back in the library. But he said students who wanted to read it would have to show a note of parental approval. The nonjury trial, which began last Wednesday, is expected to end this week.

The circuit court established a selection-removal dichotomy for library material screening and selection. The selection of materials to be placed in the library is typically an activity engaged in the ordinary course of affairs. Removals are extraordinary events that raise questions of motive. Books which become obsolete or irrelevant or which were improperly selected initially can be removed by the same authority empowered to make the selection in the first place. The operation of a school library is a constant process of selection and winnowing based upon various legal motives, including space, economy and changing educational requirements.[47] If the removal of library materials is motivated by a desire to censor, however, students' first amendment rights are violated.

THE T-SHIRT PROBLEM[48]

The wearing of clothing with printed words and/or symbols by junior and senior high school students is in vogue. Many of the messages are similar to those seen on buttons and on automobile bumper stickers. The printing or design is provided by the T-Shirt seller or creatively composed by the purchaser. The messages are often humorous, attention-getting, sometimes smutty and profane, sometimes offensive and usually have double or multiple meanings depending on what the reader perceives in the message. Occasionally, the messages are ethnic slurs. T-shirt messages may be a form of graffiti such as is seen on rest room walls. One can only speculate as to why school students wear such messages. School principals report that few, if any, of the T-shirts worn today are intended to convey a particular political message to the public. It is doubtful that any would incite disobedience or more than curiosity and modest disruption, become the subject of an obscenity case, or provoke fighting. Most fall under the category of "bad taste" and are properly "dress code" subjects. The problem is annoying to most school principals and teachers.

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[47] For more extensive discussion of this case, *see Recent Developments*, 45 Fordham L. Rev. 1236 (1977), *Constitutional Law*, 55 Tex. L. Rev. 511 (1977).

[48] T-shirt messages in public schools may not be a very serious problem. The author, by letter, requested the fifty state executive secretaries of the National Association of Secondary School Principals to send him information about any legal actions related to T-shirts. Not one legal problem was reported.

One court case which may assist in providing guidance for school officials who seek to prohibit students from wearing clothing bearing objectionable printed words or symbols incorporated in political messages is *Cohen v. California*.[49] Cohen wore a jacket bearing the words "Fuck the Draft" in a corridor of the Los Angeles Courthouse. He was sentenced to 30 days in jail for violating a California statute which prohibits "maliciously and willfully disturb(ing) the peace or quiet of any neighborhood or person . . . by . . . offensive conduct."

The conviction rested on the offensiveness of the words Cohen wore to convey his message. The phrase on the jacket was a vulgar allusion to the Selective Service System and was hardly an erotic or humorous stimulation to anyone. *Cohen v. California* was not an obscenity case. The four-letter word displayed by Cohen, in relation to the draft, was not directed toward any individual present who would likely have regarded the words as a direct personal insult. Therefore, the so-called "fighting words" principle could not be invoked. No one who saw Cohen was, in fact, violently aroused nor was this reaction intended.

It was argued and rejected in this case that Cohen's distasteful mode of expression was thrust upon unwilling or unsuspecting viewers and the state could, therefore, legitimately act to protect the sensitive from this crude form of protest. The U.S. Supreme Court has consistently stressed, however, that "we are often 'captives' outside the sanctuary of the home and subject to objectionable speech."[50] Those in the courthouse could effectively avoid the message by averting their eyes. We assume this principle would apply to public schools as well as courthouses.

The Supreme Court decision in *Cohen*, reversing the conviction, plainly reflected the *Tinker* prohibition against regulating speech based on "undifferentiated fear or apprehension of disturbance" which is not enough to overcome the right of freedom of expression. Cohen's method of expressing his political views is likely to be duplicated by some students at school and the messages may contain vulgarities. School administrators and teachers may attempt to prohibit the messages as distasteful modes of expression.

Another question is whether school authorities can prohibit smutty expressions worn on clothing on the theory that the school, acting as a guardian of public morality, may properly order the removal of the offensive T-shirt messages? It is obvious that certain expletives, standing alone, can be prohibited in order to maintain a suitable level of morality in the school. Often, however, it is not the four-letter words that are objectionable, it is the message itself. Cohen forcefully communicated to the reader, by way of a message including a "four letter word," that he objected to the draft. It is difficult to forbid particular words without also running a substantial risk of suppressing ideas in the process. If the T-shirt wording is clearly designed to convey a message analogous to the message in Cohen and if it does not provoke a disturbance or disruption, it cannot be prohibited. T-shirt messages, such as equal rights for women or gay liberation, are examples of speech which cannot be banned per se.

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[49] 403 U.S. 15 (1971).
[50] *Id.* at 21.

Clearly, students have the right to free speech in schools, but they may not use profanity or possess obscene materials freely. School authorities may prescribe rules for student possession of obscene, noninstructional materials on school premises.[51] Socially acceptable speech and conduct are proper concerns for secondary schools.[52] Therefore, prohibiting the use of profane language or the possession of obscene materials is a reasonable exercise of the educational authority's discretion in maintaining an atmosphere conducive to classroom study.[53]

Some T-shirt messages can be easily categorized as obscene and can be prohibited. However, school officials may find it difficult to determine which T-shirt messages should be banned becaue of the double meaning of some of the messages. Consider, for example the following eight selected messages:

1. Feel It
2. Delicious
3. Slippery When Wet
4. The Best Part is Inside
5. Authorized Hands Only
6. Phuque Off
7. Satisfaction Guaranteed
8. Free and Easy

None of the above include the so-called "objectionable" four-letter words or other profane words. All can be interpreted in several ways depending upon the readers' own perceptions. Devising and administering a rule prohibiting "objectionable" T-shirt messages would be a nightmare for a school administrator. Any rule which attempts to permit the wearing of some T-shirts with messages, and not others would be virtually impossible to administer.

SUMMARY

The wearing of buttons and other emblems and insignia, picketing, the wearing of message-bearing clothing, and pure speech which will likely promote diversion, disrupt and interfere with the normal operation of the school can be prohibited. However, limiting rights which are protected by the first amendment, such as freedom of expression and the communication of ideas in a school, presents serious constitutional problems.

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51. Baker v. Downey City Bd. of Educ., 307 F. Supp. 517 (C.D. Cal. 1969); Vought v. Van Buren Pub. Schools, 306 F. Supp. 1388 (E.D. Mich. 1969).

52. Webb v. Lake Mills Community Schools Dist., 344 F. Supp. 791, 802 (N.D. Iowa 1972).

53. Baker v. Downey City Bd. of Educ., 307 F. Supp. 517, 525 (C.D. Cal. 1969); Vought v. Van Buren Pub. Schools, 306 F. Supp. 1388, 1392 (E.D. Mich. 1969).

Obviously, decisions must be made on a case-by-case basis. The decision of school officials to regulate student speech requires a careful review of the circumstances and a close appraisal of the reasons advanced for the regulation in the first place. The decision must be supported by clear, convincing and unequivocal evidence. If speech is to be restricted, the interests to be protected must be fundamental and substantial.

The constitutional guarantee of freedom of speech does not confer an absolute, unrestricted and unbridled immunity for every possible use of language. The abuse of free speech is subject to curtailment and/or punishment. The proper operation of the school is one of the highest amd most fundamental responsibilities of the state. School authorities have a legitimate and substantial interest in the orderly conduct of the school and a heavy obligation to protect the school's operation against disturbance and disruption. If the school cannot function, and the reason is plainly tied to student speech, the courts will support the reasonable exercise of power and discretion by the school authorities to curtail the speech.

We have been reminded in *Shelton v. Tucker* that "the vigilant protection of constitutional freedom is nowhere more vital than in the community of American schools."[54]

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[54] 364 U.S. 479 (1960).

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The Imagination of Students is not Always Free Speech

M. Byron Fisher
Attorney at Law
Fabian and Clendenin
Salt Lake City, Utah

FIRST AMENDMENT RIGHTS OF FREE SPEECH

To the consenting adult, first amendment rights of free speech may be something very different from the restrictions which the school district may impose upon students.

School law has struggled with the problems of freedom of the press and control of school newspapers; freedom of expression and the distribution of so-called underground literature; and freedom of self expression and the wearing of arm bands, demonstrations and picketing, hair lengths and dress codes.

Much of yesterday's self-imposed free speech, the turmoil of the 1960's, has been rechanneled by the Supreme Court decisions of recent vintage in judging conduct of free speech under the guidelines of "Contemporary Community Standards".

LEWDNESS, INDECENCY AND OBSCENITY

The community standards are not, in today's world, national standards. Similarly, it is assumed that community standards do not mean state-wide standards. Rather, the community, as a small integral unit, might be considered a geographical unit such as a school district for which there is a "Contemporary Community Standard".

The Supreme Court set out a three part test for obscenity in the case of *Miller v. California*[1]:

> (a) whether the average person, applying "contemporary community standards" would find that the work, taken as a

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[1] 413 U.S. 15, 24 (1973).

> whole, appeals to the prurient interest ...; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Contemporary community standards (the first prong of the test) are not what is, in fact, accepted in the community as a whole. This is not a standard necessarily defined by a legislature although the legislature may act to define specific conduct which would be contrary to the community standard and it may impose a geographic limit on the determination of community standards by defining an area from which a jury may be selected, or by dimensions set by zoning laws.[2]

In an obscenity case, the jurors may apply their own understanding of the tolerance of the average person in their community, their own subjective reactions and the reactions of the entire community.[3]

In *Erznoznik v. City of Jacksonville*,[4] the Supreme Court applied the *Miller v. California* tests to a community involving unwilling viewers. The specific state statute at issue dealt with showing nudity at a drive in movie which was visible from a public place. The Court held that the ordinance was discriminatory, found that the unwilling viewer could avoid exposure, and outlined the case law dealing with issues pitting the first amendment rights of speakers against the privacy rights of those who may be unwilling viewers.[5]

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[2] Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976).

[3] Smith v. U.S., 52 L. Ed.2d 324 (1977).

[4] 422 U.S. 205 (1975).

[5] *See* Kovacs v. Cooper, 336 U.S. 77 (1949); Breard v. Alexandria, 341 U.S. 622, 641-645 (1951); Cohen v. California, 403 U.S. 15 (1971); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974). *See generally* Haiman, *Speech v. Privacy: Is There A Right Not To Be Spoken To?*, 67 Nw. L. Rev. 153 (1972). Such cases demand delicate balancing because "[i]n th[e] sphere of collision between claims of privacy and those of [free speech or] free press, the interest on both sides are plainly rooted in the traditions and significant concerns of our society." Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491 (1975). When the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the first amendment strictly limits its power. *See, e.g.*, Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972); Fowler v. Rhode Island, 345 U.S. 67 (1953); Kovacs v. Cooper, 336 U.S. 77, 97 (1949) (Jackson, J., concurring). Such selective restrictions have been upheld only when the speaker intrudes on the privacy of the home, *see* Rowan v. Post Office Dep't, 397 U.S. 728 (1970), or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure, *see* Lehman v. City of Shaker Heights, 418 U.S. 298 (1974). As Mr. Justice Harlan cautioned: The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is ... dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections. Cohen v. California, 403 U.S. 15, 21 (1971).

CONTROLS OF FREE SPEECH

The state, a municipality, or, in our case, a school district may adopt rather stringent controls on communicative materials available to youth.[6] The Court has given some very specific and well-defined circumstances under which minors may be protected from the dissemination of materials.[7]

In determining what communication can be subject to control, the Supreme Court has said, "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them."[8]

THE SPECIFIC PROBLEM

Youth's imaginative use of language brings about many circumstances for decisions concerning discipline. Lettered tee-shirts happen to be our present area of concern. Examples are as follows:

The Debate Club - "Debators do it orally"
The Scuba Diving Club - "Scuba Divers do it deeper"
The Rodeo Club - "Put a wild thing between your legs"
The Pep Club - "High steppers are virgins, the tee shirts are dirty".

Where does the school district's attorney draw the line in weighing freedom of speech versus the care and welfare of minor children? In making that decision, the following criteria for determining lewd and obscene language may be applied: 1) the guarantees of freedom of speech; 2) the "Contemporary Community Standards;" and 3) the non-prescription of expression accessible to minors.

The established guidelines of your school and school district may well be considered the basis for "Contemporary Community Standards." That test, weighed with what is "patently offensive" and "lacking in serious value," provides the basis for determination.

FREE SPEECH AND ORDERLY CONDUCT

The school districts have one additional advantage. Since the districts are charged with maintaining the orderly conduct of students by providing an educational atmosphere with sufficient discipline to satisfy the state requirement of providing equal educational opportunities for all, the use of potentially obscene material may materially and substantially interfere with the requirement of appropriate discipline. The school district must provide fundamental safeguards to proscribe and control conduct in the schools while recognizing the limitations of the first amendment guarantees.[9]

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[6] Ginsberg v. New York, 390 U.S. 629 (1968); Tinker v. DesMoines Sch. Dist., 393 U.S. 50 (1969).

[7] Interstate Circuit Inc. v. City of Dallas, 390 U.S.676 (1968); Rabech v. New York, 391 U.S. 462 (1968).

[8] Erznoznik v. City of Jacksonville, 422 U.S. 205, 213 (1975).

To the issue of freedom of speech involving lewd or obscene language may then be added the issue of controlling behavior which may lead to the disruption of normal school activities and disorderly student conduct as a basis for proper disciplinary action.

DISCIPLINARY PROCEDURES

Disciplinary procedures come into play only after it is decided that the school district has a right to control the form and manner of student conduct. Compliance with due process procedures for student suspension facilitates the establishment of workable school district and student relationships.

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[9] *See* Tinker v. Des Moines Independent Community Sch. Dist., 393 U.S. 503 (1969), affirming the earlier cases of Epperson v. Arkansas, 393 U.S. 97 (1968) and Meyer v. Nebraska, 262 U.S. 390 (1923).

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22

Negative Statements in Letters of Recommendation: from Defamation to Defense

Delbert K. Clear
Associate Professor of Educational Administration
The University of Wisconsin–Milwaukee

Although tort suits arising from negative statements made in personnel recommendations are relatively uncommon,[1] several factors are converging to make the matter of interest and of some concern to educators. First of all, various states' and the federal "sunshine laws," negotiated provisions in collective bargaining agreements; and the threat of civil rights claims, implicitly overlaying demands for "reasons" for nonemployment, have effectively opened up institutional personnel files to the extent that virtually anybody can learn the contents of his or her file.[2] Matter written prior to 1974 would seem to be exempt from such "light". Though it is customary for placement offices to offer candidates the option of waiving their rights of access voluntarily, there is doubt that the practice offers the same protection enjoyed by writers in the good old days of confidentiality. Anyone contemplating the sheer logistics of keeping track of waived and non-waived files will necessarily realize that inevitably access to waived files will occur. This cannot but compel writers of letters to think twice about making negative comments.

It should be noted that letters of recommendation from one employer to another are not subject to these laws. Negotiated labor agreements may make in-house records available, but there is no guaranteed access to recommendations sent by a former employer to a subsequent, prospective one. Though these would seem, consequently, "safe," the case discussed below is ample warning that they should not be presumed to be so. The expanding due process guarantees make it highly likely that candidates for positions can eventually see whatever is written. After all, the prospective employer who declines to hire a person certainly wants to avoid having no reasons for *not* hiring a candidate.

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[1] Their confidentiality prior to 1974 and the practice of having people waive access to them subsequently no doubt contributes to this.

[2] In Wisconsin, Wis. Stat. § 118.25 (1973) pertains only to elementary and secondary school records. The federal Family Educational Rights and Privacy Act of 1974 (the so-called "Buckley Amendment") covers higher education and includes personnel files in placement offices. The Civil Rights Act of 1964 has the potential for considerable leverage on gaining access to institutional personnel records, as well.

The second converging factor is the rapid decrease in opportunities for employment in education. it is not unusual to have 150 to 200 applicants for a single position. Thus, the competition is keen, and applicants have a strongly vested interest in being sure that the contents of their files contain no hint of adverse criticism.

Thirdly, increases in the economic status of teaching in the past decade impels those already employed to remain in teaching. If they are forced by enrollment declines, or other circumstances, to relocate, they do not want to change occupations. Consequently, the number of people desiring to teach remains high. This factor and the preceding one, of course, mutually exacerbate each other.

Lastly, the generous supply of candidates now available gives writers of recommendations the opportunity to be more candid than they might have been during times of teacher shortage. There is no longer a need to overlook minor deficiencies since many candidates, with no apparent problems, are available. This factor, however, is a source of trouble for it directly provokes the increased sensitivity brought on by employment patterns and the apparent ease of legal redress. On the one hand, there is the trap of the "sunshine laws" and the civil rights legislation; on the other hand are the springs that load it—decreasing opportunities and increasing desirability of teaching.

Though the extent to which the above trends are influencing writers of personnel recommendations is not known, there is reason to believe that, waivers notwithstanding, writers of letters these days do one of two things—they either say something good or they say nothing.[3] Certainly making nothing but positive comments or no comments at all would seem a good way to avoid the possibility of legal hassles. However, this is educationally irresponsible for it precludes employers from taking full advantage of the opportunity they now have to upgrade their staffs through highly selective recruitment. Educators must develop a professional obligation to be candid about people in their letters of recommendation so that prospective employers will have adequate bases upon which to make initial decisions.

Protection against legal harrassment is a legitimate concern, however. Skill is required in order to write letters that are both educationally sound *and* legally defensible. Fortunately, such skill can be rather easily developed by applying known legal parameters when drafting letters of recommendation. A 1974 case in a Wisconsin court[4] provides an excellent basis for developing the requested skill. In this case, the plaintiff, a school teacher, sought damages for defamation of her professional reputation by the defendant, who was the Superintendent of a school system in which she was once employed. The case arose after a recommendation made by the defendant to a subsequent prospective employer of the plaintiff resulted in her not being hired. The background facts, as presented by the plaintiff, the defendant, and the prospective employer, were as follows:

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[3] Various colleagues of the author deal with it as follows: "I always write about positive attributes. Negative ones I simply leave out." "I refuse to write letters for people unless I can write outstandingly good ones." "I refuse to write letters for anyone." "I only deal with "hard" data—records of attendance, grades earned, etc." Further, anyone who has read recently compiled files appreciates the massive amounts of non-information in them.

Plaintiff:

1. Taught in the Two Rivers, Wisconsin School System from 1957-1963. Resigned to have a baby. Classroom evaluations of principals and other supervisors all satisfactory.
2. Taught in the Sheboygan, Wisconsin School System from 1965-1970. Resigned because of differences in teaching philosophy between herself and a principal.
3. Applied to more than 14 school systems between February and August, 1970 (including Two Rivers) to no avail. She was on occasion told that she was not hired because "other better qualified candidates" were available.
4. Worked on a volunteer Citizens' Committee in Two Rivers during 1970 and 1971. Defendant was the representative of the School System on this committee.
5. Held various part-time jobs during 1970 and 1971. Completed Masters Degree in summer of 1971. Divorced in summer of 1971.
6. In August of 1971 was notified by Milwaukee Public Schools that a job was available for her and that she could begin working immediately even though she couldn't be given a formal contract until her personnel file, including recommendations from previous employers, was complete.
7. Began teaching in Milwaukee on August 30, 1971. Experienced difficulty controlling her class. Principal orally notified an assistant in the personnel office of the situation on several occasions. On September 3, plaintiff was transferred to "regular substitute" status, which in Milwaukee is a contract position with guaranteed employment at some school every day. This assignment continued for about one week.
8. Personnel file and formal drafting of teaching contract not yet completed as of September 9th.
9. Called into personnel office at 3:30 p.m. on Friday, September 9th and told that she was "discontinued."
10. Reactivated her applications to the 14 schools she had applied to earlier, plus some additional ones.

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[4] Burish v. Rice, (Cir. Ct. Manitowoc Co., Wis., filed Sept. 16, 1974).

11. Worked one-half day subsequently as a substitute teacher in another district.

12. Held numerous part-time, non-teaching jobs beginning in 1971.

Defendant:

1. Superintendent of Schools in Two Rivers in 1970, but not there in 1963.

2. Came to know the plaintiff while both were on the Two Rivers Citizens' Committee in 1970. Was treated in an abrasive and uncooperative manner by the plaintiff.

3. During late August, 1971 received a request from the Personnel Division of the Milwaukee Public Schools to fill out their standard reference form for the plaintiff. Did so and, among other things, stated that he "would not hire or rehire" her. In response to a question of whether he knew of any personal or professional characteristics that would keep her from being a successful teacher, answered, "yes, trouble holding position." Defendant did not consult the plaintiff's personnel files while completing the form.

4. On Wednesday, September 7, 1971, called the Personnel Director of the Milwaukee Public Schools regarding plaintiff and stated that "as an employee she will be trouble," and reviewed what his responses on the forthcoming written form would be.

Milwaukee Public Schools:

1. Several times between August 30 and September 2, the principal of the plaintiff's school talked to an assitant in the personnel office reporting that plaintiff was having difficulty in controlling her class.

2. Transferred plaintiff to permanent substitute status on September 3. Asked the principal to complete a standard form evaluating the plaintiff and attesting to her difficulties.

3. Personnel Director was not made aware of the plaintiff's teaching difficulties.

4. On September 7, after talking to defendant on the telephone, the Milwaukee Public Schools Personnel Director notified his assistant that he wanted to "be in on the final decision" regarding drafting a formal contract for the plaintiff, and also said, "off with her, immediately." He commented to his assistant that he had received a "very derogatory" telephone call regarding the plaintiff. At this time, the Personnel Director was told about the calls from plaintiff's principal.

5. On September 8, written form from the principal received in the Personnel Office. Defendant did not see it.

6. On September 9 at 3:30 p.m., the plaintiff was informed that she was being "discontinued" (no contract having ever been completed).

7. The written form from the defendant arrived in the personnel office at 3:50 p.m. on September 9.

The major issues raised in this case are as follows:[5]

1. Were the statements and publications of the defendant defamatory?
2. If they were defamatory, were they substantially true, and, hence, an adequate defense?
3. If they were defamatory but untrue, were they protected by absolute or qualified privilege?
4. If conditional privilege existed, did the defendant abuse it and, thereby, lose it?

It is on these four issues that writers of letters of recommendation must focus, whether the letters are drafted for placement files or forwarded directly to prospective employers. The best place to begin is to clarify the essentials of the matter. First, and most important, is a straightforward realization of the intent. If one starts with the *given* that there are some people about whom candid descriptions are going to be a disadvantage, then purposeful, conscious communication that will lower the candidate in the estimation of prospective employers will occur and may possibly deter them from hiring him or her. This purpose almost exactly fits the following legal definition of defamation: "A communication is defamation if it tends to so harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[6]

Herein is the intent. Including negative information in a recommendation gives to the intent to defame. This is where writers of such communications must not back off by trying to write something that is at once non-recommendatory and non-defamatory (the sly art of writing between the lines, which results in the bland, meaningless references referred to in note 3). Looking at it this way, the former employer must decide whether to help or hinder (damning with faint praise is not a responsible option) the person in gaining subsequent employment. Inasmuch as there will always be times when it is both appropriate and professionally obligatory to risk hindering an employee's future employment by completely and accurately describing both positive and negative qualities, employers must be prepared to include negative statements in personnel recommendations. Once this is accepted, attention turns to strategies for preserving the standard defenses against adverse judgments in the defamation suits that such action will generate.

DEFENSES AGAINST LIBEL AND SLANDER

Whether defamation constitutes libel and/or slander is determined by the answers to a series of interrelated questions that are arranged in a three-tiered hierarchy. The primary test concerns whether or not the communication was true. if it was, the defense is complete. Determining this, in turn, requires a number of secondary tests. The second basic test, needed only if the first is not satisfied, concerns whether or not the communication was protected by privilege. It also has an associated list of secondary tests. Figure 1 below presents a schematic overview of this entire section:

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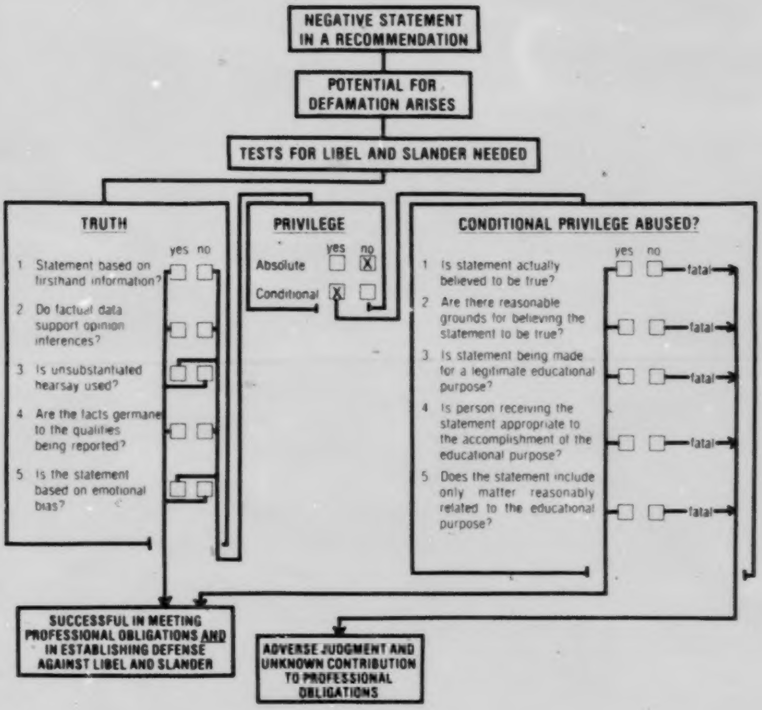
[5] One underlying issue of historical interest was not discussed in the case, *i.e.*, how the plaintiff found out about the telephone call, its contents, and the contents of the defendant's written form.

[6] Ranous v. Hughes, 30 Wis. 2d 452,460 (1966).

Figure 1

Checklist for Protection Against Libel and Slander When Writing Personnel Recommendations


NEGATIVE STATEMENT IN A RECOMMENDATION
POTENTIAL FOR DEFAMATION ARISES
TESTS FOR LIBEL AND SLANDER NEEDED
TRUTH
yes no
1 Statement based on firsthand information?
2 Do factual data support opinion inferences?
3 Is unsubstantiated hearsay used?
4 Are the facts germane to the qualities being reported?
5 Is the statement based on emotional bias?
PRIVILEGE
yes no
Absolute ☐ ☒
Conditional ☒ ☐
CONDITIONAL PRIVILEGE ABUSED?
yes no
1 Is statement actually believed to be true? fatal
2 Are there reasonable grounds for believing the statement to be true? fatal
3 Is statement being made for a legitimate educational purpose? fatal
4 Is person receiving the statement appropriate to the accomplishment of the educational purpose? fatal
5 Does the statement include only matter reasonably related to the educational purpose? fatal
SUCCESSFUL IN MEETING PROFESSIONAL OBLIGATIONS AND IN ESTABLISHING DEFENSE AGAINST LIBEL AND SLANDER
ADVERSE JUDGMENT AND UNKNOWN CONTRIBUTION TO PROFESSIONAL OBLIGATIONS

Truth as a Defense

The numerous standards that are used to determine truth are clearly established. First, the more first-hand information the writer has, the better. Therefore, comments should preferably be based on actual contact or observation. In the case of large organizations in which those writing the recommendations may be precluded from direct contact, information should be sought from direct supervisors and the recommendations should be based on that information. Secondly, even when this is done, the factual data must support opinion inferences. For instance, if all direct supervisor ratings are satisfactory, then the over-all recommendation cannot be to the contrary absent other, more persuasive, information. Thirdly, opinion inferences should not be made without factual data to support them. This is an especially difficult matter when important qualities are inferred from hearsay reports. No matter how important they may be, they should either be verified or left out. Lastly, recommenders who allow negative emotions toward employees to motivate them run the risk of violating the truth standard. Bias can lead to the failure to see things in a fair perspective. At its worst, this results in reporting facts that are not directly related to the qualities being asserted. This risks imputation of malice, which, while not fatal to the truth test, does become a serious handicap if later tests for abuse of privilege are required.

In the 1974 Wisconsin case, the defendant was found to have failed the truth test for the following reasons:

1. He had failed to consult the district's personnel files before making out the report (recall: he was not Superintendent while plaintiff taught in Two Rivers).
2. Defendant's statement, "trouble holding position" could not be substantiated by any facts known to him. As a matter of *fact*, her employment record showed reasonable reasons for every change of position.
3. The fact that plaintiff was abrasive to defendant while on the Citizens' Committee was found to be irrelevant, per se, to her teaching. Absent any other information, defendant's extrapolation from that to his allegation that "she will cause trouble" was unwarranted.
4. Defendant's statement that he would not hire or rehire plaintiff was adjudged inaccurate because he testified that it meant only that he did not hire her on one occasion because there were other better qualified candidates available.

The defendant's failure to meet the test of truth under the "substantially true" standard used in Wisconsin,[7] placed him in the second tier of defense—that of privilege.

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[7] Meier v. Meurer, 8 Wis. 2d 24 (1959).

Privilege as a Defense

In Wisconsin, as in other jurisdictions, there are two kinds of privilege: absolute and conditional. If either exists, communication is protected against libel and slander judgments even though it is defamatory and fails the "truth" test.

Since absolute privilege is afforded only to a limited number of principal federal and state officers, minor officials, such as school superintendents, are protected in the pursuit of their official duties by conditional privilege. This is a mixed blessing. On the one hand, it may save the day when truth fails as a defense. On the other hand, it is a vulnerable defense because it may be lost if abused, and the same qualities that lead to the failure of the truth test lead to judgments to the effect that the privilege was, indeed, abused. This gives rise to a series of secondary tests to determine whether a conditional privilege has been maintained or lost.

Abuse of Conditional Privilege

A number of tests are uniformly applied to determine whether conditional privilege has been abused. It is crucial to note that the failure of any of them will cause loss of the privilege.[8] This is unlike the tests for truth as a defense where the overall content, rather than each specific element, is assessed. The intent of the tests is to determine whether the communication was made in order to accomplish the purpose for which the privileged was granted (in the Wisconsin case, to allow a subsequent employer to learn from the experiences of a former one) and to determine whether the communication was made without malice. In order to establish the former, it must be determined that the statement was made for a legitimate educational purpose, that the recipient was appropriate to that purpose, and that the information communicated was related to it. Inferences regarding malice was the intent will be made by determining if the defendant actually believed or had reasonable grounds for believing the statements made, or if he may have had an improper motive for making the statements.

In the Wisconsin case, the court found the following:

1. The communications were, indeed, made for a purpose related to the granting of conditional privilege. Recommending a former employee was a legitimate purpose.
2. The communications were made to appropriate persons as well. The Personnel Director of the Milwaukee Public Schools was the only one with whom the defendant communicated.

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[8] Ranous v. Hughes, 30 Wis. 2d 452, 460 (1966).

3. The information related was relevant to a prospective employer. Such statements as "trouble holding a position" and "she will be trouble" are germane to deciding whether to hire someone.
4. The remaining two tests, however, were a different matter. According to the court, the communications were either not believed to be true by the defendant or, if actually believed, the belief was based on insufficient grounds.

Following the rule that conditional privilege can be lost if any one of the tests is failed, the court held the defendant liable for defamatory remarks and awarded the plaintiff damages roughly amounting to what her salary would have been during three years of probationary teaching (Milwaukee has statutory tenure).

Perhaps most instructive about the case was the court's handling of the various tests of truth as a defense and conditional privilege. Regarding the former, the court observed that the defendant had not proved the substance of his statement, "as an employee, she'll be trouble." Though he denied saying it, the court believed otherwise. The defendant made the prediction without ever supervising her personally, contacting anyone who had, or consulting her personnel file. The only basis remaining, therefore, was knowledge he obtained when they both served on the Citizens' Committee. yet, he chose not to describe this candidly, testifying instead that the relationship between them during that time was cordial. Despite this, the court ruled that it was a "fair inference" that the defendant had become angry with the plaintiff for the abrasive way in which she had dealt with him at the time and he was actually motivated now by a desire for retribution.

The court's handling of the truth of defendant's statement that he would not hire or rehire the plaintiff is, on its face, somewhat puzzling. It stated that the "No" answer of the defendant was defamatory per se, and therefore, must be based on reasonable evidence in order to meet the truth test. Yet, when the defendant tried to soften his answer by explaining that it was not meant to be absolute,[9] the court used this against him, noting that by so doing, he admitted to the untruth of the original statement. Thus, he lost either way.

Defendant's problems here stem from his decision not to make the Committee experience part of his defense. At the time, this decision had an element of prudence. To raise openly the facts of the hostility that developed between the defendant and plaintiff would invite a charge of malice. Further, the activity was not directly related to employment and anything the plaintiff said or did at the Committee meetings could be protected by the first amendment.

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[9] Should an employer *ever* make such a prediction? Who is hired *always* depends on who is available at the time!

Yet, the cure turned out to be worse than the malady. By ignoring the Committee episode completely, the defendant was forced into the untenable position of having made a defamatory comment without having an adequate basis for believing it. The fact that animosity was associated with the episode only deepened his problem.

"Trouble holding a position" was similarly held either to be untrue or groundless. The plaintiff's employment record—teaching in one place for six years and in another for five with reasons for termination in both cases being above reproach—was taken as evidence directly contradicting defendant's statement. The court viewed the defendant's statement as needing historical verification inasmuch as he offered no evidence that would make it predictively valid.

In the tests to determine whether the statements, even though wanting in truth, were protected by conditional privilege, the court explained that because the communications were limited to matters pertaining to suitability for employment and were made only between representatives of a former and a prospective employer, three of the conditions were met.[10] Certainly, such phrases as "as an employee she will be trouble," "trouble holding a position," and "unwillingness to hire or re-hire," would be relevant, if true.

The court pointed out, however, that the defendant had failed to meet the two tests of believing in the truth of his statements, and in having reasonable grounds for so believing. Though he said, "She'll be trouble," he did not present a basis for the statement. He refused to admit to any problems with her on the Citizens' Committee, did not check the records of her employment in Two Rivers, and was not Superintendant when she was employed there. Consequently, the court held that he had *no* valid basis for the statement. Similarly, since the defendant failed to offer any evidence to the contrary, the plaintiff's employment record was held to indicate that his comment regarding her having trouble holding a position was groundless. Lastly, the court observed that if he hadn't really meant that he wouldn't hire or rehire her, he shouldn't have said it. Thus, the defendant failed two major tests, either of which would have been fatal.

What should defendant have done? To begin with he should have recognized what his limitations and obligations were. If he *really* had no opinion as to whether he would hire or re-hire the plaintiff, he should have left the item blank, or responded to the effect that it would depend on who else was available. If he actually wanted to say that he would not employ her, then he was obliged to make a case for it in order to provide a defensible rationale for himself and to overcome the opposite thrust of her employment history. If he felt that her attitude and ideas were such that a prospective employer should know about them, he should have again made a case in support of his statement. He might have done so by simply describing her behavior and actions related to employee status, generally, as he had encountered them. He should also have noted, at the same time, that he had no first-hand knowledge about her teaching, or her employment file. If he wanted to extrapolate from the Committee service to success in teaching, the burden was on him to make the connection. The fact that the Committee was a group dealing with education would suggest that such might have been possible.

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[10] *See* appropriate spaces on Figure 1.

Writers of negative recommendations must stand ready to meet the defense tests in order to protect their remarks in defamation actions. Since these tests all cluster around a central theme, truth, it ultimately boils down to a matter of saying only what is *known* about the person, with "known" defined both strictly and completely. Statements made must include only first-hand or other objectively verifiable qualities germane to the purpose of the privilege *and* must include *all* such available information. The defendant in the Wisconsin case erred on both counts. He mistook his feelings about the plaintiff for knowledge about her suitability as a teacher. In his zeal to have those feelings affect the plaintiff's employment, he overlooked compelling objective data. There is no doubt that he could have effected the result he desired and kept the plaintiff out of the classroom at much less cost had he based his recommendations more completely on facts and knowledge that he had.[11] However, the defendant allowed his subjective reactions to the plaintiff to seduce him into compromising his legal defenses to justifiable defamation.

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[11] It should be noted that the actual competence of the plaintiff as a teacher was not at issue although there is evidence that defendant's position was educationally sound.

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The Courts and the Out-of-School Activities of Teachers

Jerry Donnelly
Professor of Education
Eastern New Mexico University

Much of the teacher-related litigation in the courts continues to emphasize the public interest in regulating the private lives of teachers.[1] In balancing public and individual interests, the courts often apply the legal "tests" that emerged in such cases as *Pickering v. Board of Education,*[2] *Morrison v. State Board of Education,*[3] *Tinker v. Des Moines School District,*[4] and *Wood v. Strickland,*[5] although, not infrequently, with varying results. An examination of recently reported cases[6] confirms the abiding public concern with sexual conduct, "immorality," and drugs. Residency requirements, political activity, and outside associations of teachers have also been the source of recent litigation. The courts tend to examine these alleged infringements under 42 U.S.C. § 1983 and the first and fourteenth amendments to the United States Constitution. This paper considers some recent state and federal court decisions in these areas in the light of some of the more significant decisions handed down previously by the courts.[7]

HOMOSEXUAL CONDUCT

Cases involving both the private and public sexual conduct of public school teachers appear to command a considerable share of the public's attention. The most conspicuous and most controversial of these cases have been those dealing with alleged or admitted homosexuality. In its recent decision not to review *Gaylord v. Tacoma School District No. 10,*[8] the United States Supreme Court has clearly returned the problem of conflicting reasoning in the previous decisions regarding the homosexual behaviors and attitudes of teachers to state and lower federal courts.

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[1] Few discussions of public attempts to control the private lives of public school teachers fail to take note of the often tyrannical social, religious, and personal restrictions included in many 19th and 20th century teacher contracts. *See e.g.*, H. Beale, *A History of Freedom of Teaching in American Schools* (1941).

[2] 391 U.S. 563 (1968).

[3] 82 Cal. Rptr. 175, 461 P.2d 375 (1969).

[4] 393 U.S. 503 (1969).

[5] 420 U.S. 308 (1975).

[6] Through October 1977.

[7] No attempt is made to discuss cases involving restrictions on marital status or pregnancy-related leave requirements.

To illustrate this conflict it is useful to review *Gaylord* in conjunction with some of the significant holdings in related cases such as *Sarac v. State Board of Education,*[9] *Morrison v. State Board of Education,*[10] *Burton v. Cascade School District,*[11] *Board of Education of Long Beach Unified School District of Los Angeles County v. Jack M.,*[12] and *Gish v. Board of Education of the Borough of Paramus.*[13]

Gaylord, a high school teacher, contested the action of the school district dismissing him because of his "status" as a homosexual and his public disclosure of such. The trial court agreed with the school district. On appeal to the Washington Supreme Court, however, the case was remanded for findings of fact on the grounds that the trial court had misinterpreted a state statute in relying on the opinions of school administrators who had testified adversely as to the impact of homosexuality on the "optimum learning atmosphere" in the school. In the view of the higher court, the trial court had relieved the school district of providing the "preponderance of evidence" required under the appropriate Washington statute.[14] On remand, the charge of "immorality," not previously stated, was made. In again upholding the dismissal, the trial court found "substantial evidence" based on the following reasoning: Gaylord's homosexuality was a fact constituting immorality; his homosexuality was a disorder for which he sought no relief and, hence, was voluntary; other teachers in the school testified that they objected to his presence there; impairment of ability to meet the requirement to teach morality; danger of student emulation or approval; and unreasonableness of expecting administrators to wait for overt manifestations of homosexuality from one with such proclivities. The Washington Supreme Court, on a second appeal, affirmed, agreeing that the evidence presented was "substantial."[15] As noted, the United States Supreme Court denied certiorari.[16]

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[8] 559 P.2d 1340 (Wash. 1977), *cert. denied,* 46 U.SL.W. 3072 (1977).

[9] 249 Cal. App. 2d 58, 57 Cal. Rptr. 69 (1967).

[10] 82 Cal. Rptr. 175, 461 P.2d 375 (1969).

[11] 512 F.2d 850 (9th Cir. 1975), *cert. denied,* 423 U.S. 839 (1975).

[12] 139 Cal. Rptr. 700, 566 P.2d 602 (1977). *See also* Board of Educ. of Long Beach v. Millette, 133 Cal. Rptr. 275 (1976).

[13] 145 N.J. 96, 366 A.2d 1337 (1976), *cert. denied,* 46 U.S.L.W. 3031 (1977).

[14] Gaylord v. Tacoma Sch. Dist. No. 10, 85 Wash. 2d 348, 535 P.2d 804 (1975).

[15] *Id.* 559 P.2d 1340 (1977).

[16] *Id.* 46 U.S.L.W. 3072 (1977).

The reasoning of the Washington courts in *Gaylord* parallels the finding of the California Court of Appeals in *Sarac* where a "rational connection" was established between alleged homosexual conduct and the decision by the State Board of Education to revoke certification.[17] This view, however, was rejected by the state's highest court in *Morrison* since no "fitness to teach" test was applied nor was any effect of Morrison's homosexual conduct on his teaching performance demonstrated.[18]

The widely-known facts of the cases under discussion, of course, differ. In *Sarac*, criminal homosexual conduct was established by police testimony and was public; in *Morrison*, at issue was a private, self-admitted, "limited, noncriminal physical relationship" with a fellow male teacher over a one week period.[19] Using the *Morrison* test in *Gaylord*, the dissent pointed to the absence of any proof of impairment of teaching performance and to the lack of *any* evidence of overt homosexual activity.[20]

In the previously cited *Burton v. Cascade School District*, rather than focus on the questions of "immorality" and "impairment" due to homosexuality, as was done in *Gaylord*, *Sarac* and *Morrison*, the court addressed the legality of the dismissal of a nontenured female high school teacher under what she claimed was an "unconstitutionally vague" Oregon statute. Both the trial court and the Ninth Circuit Court of Appeals agreed on the vagueness claim and awarded damages. However, both courts refused to reinstate the plaintiff based upon an insufficient property interest. Hence, no ruling emerged on what appear to be the central issues relative to homosexual status or behavior and their "rational connection" with teacher performance.

Another case involving court-awarded damages to a reportedly homosexual teacher appeared recently in *The Chronicle of Higher Education*.[21] A University of Delaware professor's contract was not renewed, according to the university president, for his "advocacy" of homosexuality as reported in several newspapers, for advancing a personal cause through his faculty position, and for not clearly establishing that he was not a university spokesman. The United States District Court rejected the reasons stated by the president on all counts since there was no evidence of a "campaign to convert heterosexuals to homosexuality" or of university condonement of the statements. In ordering reinstatement, back pay, and compensatory and punitive damages, the court ruled that the teacher's first amendment rights of speech had been violated. In an obvious application of *Pickering*,[22] the court found no disruptive results for the university as a result of the teacher's public statements, nor any effect on the performance of his duties.

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[17] Sarac v. State Bd. of Educ., 249 Cal. App. 2d. 58, 57 Cal. Rptr. 69 (1967).

[18] Morrison v. State Bd. of Educ., 82 Cal. Rptr. 175, 186, 461 P.2d 375, 386 (1969). The fitness factors outlined in *Morrison* dealt with whether the conduct had an adverse effect on students and teachers, degree of adversity, recency of the conduct, type of certification held, extenuating circumstances, motives, likelihood of recurrence, and the extent to which punitive action would "chill" the exercise of constitutional rights or otherwise affect them.

[19] *Id.* at 176, 461 P.2d at 377.

[20] Gaylord v. Tacoma Sch. Dist. No. 10, 559 P.2d 1340, 1347 (1977).

[21] The Chronicle of Higher Education, July 6, 1977, at 6, col. 1.

While the decision was not based on the teacher's rights as a homosexual, an important aspect of the case would seem to be that the court assumed no "rational relationship" between homosexuality and the teacher's effectiveness.

In what appears to be the final disposition of the *Jack M.* case,[23] the California Supreme Court recently concluded that a tenured elementary school teacher who was arrested for homosexual solicitation and self-exposure in a public restroom was "not unfit or unfit per se." Although, in a reversal of the trial court, the appellate court majority found that the conduct was "immoral" and "in and of itself" established "unfitness," the high court overruled and accepted the trial court's reliance on the expert testimony of a psychiatrist stating that the isolated instance described did not establish homosexuality nor suggest recurrence or danger to pupils or associates. Essentially, the factors elaborated in *Morrison* were applied. Other considerations, such as the defendant's "unblemished" teaching record and recognized ability, as well as statutory requirements entered into the ruling of the court. Most significant, however, in the *Jack M. (Millette)* series of cases, is the conflict in the views of the California courts regarding the nexus between homosexual conduct and "unfitness." The rejection of automatic assumptions of immorality and impairment of teaching function by the California Supreme Court may serve as offsetting precedent to the findings of the Washington courts in *Gaylord*, or it may compound it.

The denial of certiorari by the United States Supreme Court in *Gish* in October, 1977 must also be noted.[24] Left standing is the order of the school district, upheld by the New Jersey Supreme Court, requiring the psychiatric evaluation of a teacher because of his advocacy of gay rights. In *Gish*, the New Jersey courts found statutory authority for the requirement which was based on the possibility of "deviation from normal mental health." Terming the order "fair and reasonable," the state courts saw no violation of first or fourteenth amendment rights. Citing *Adler v. Board of Education City of New York*,[25] the court took notice of "the sensitive area" in which the teacher works and of the "right and duty" of school authorities "to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools . . . ."[26]

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[22] Pickering v. Board of Educ., 391 U.S. 563 (1968).

[23] Board of Educ. of Long Beach Unified Sch. Dist. of L.A. County v. Jack M., 139 Cal. Rptr. 700, 566 P.2d 602 (1977). *See also* Gaylord v. Tacoma Sch. Dist. No. 10, 85 Wash. 2d 348, 535 P.2d 804 (1975).

[24] Gish v. Board of Educ. of the Borough of Paramus, 46 U.S.L.W. 3031 (1977).

[25] 342 U.S. 485 (1952).

The *Morrison* tests of evidence of unfitness and impairment of teaching performance are obviously not uniformly adhered to or interpreted; nor, on the other hand, are the apparently "automatic" assumptions resulting in the findings in *Sarac*, *Gaylord*, and *Gish*. In view of the failure of appellants to have these issues heard in the United States Supreme Court, commonly accepted guidelines are not likely to be agreed upon in the several state and lower federal courts.

HETEROSEXUAL CONDCUT

Whether the private heterosexual conduct of teachers is afforded a greater degree of protection by the courts than is private homosexuality is problematic. On the basis of some fairly recent decisions, it might be said that the courts generally tend not to interfere with private, noncriminal, heterosexual associations between consenting adults if such associations, in the case of teachers, are not so repugnant to societal and community "standards" as to invoke questions of "immorality" and "fitness" or if a teacher's right to privacy and association is not outweighed by a compelling state interest. Even such a cautious assertion, which finds support to some extent herein, must be tempered by taking note of a number of problems frequently encountered due to language and to varying sets of values. There are also other factors which have been identified as typically entering into the decisions of the courts that require comment.

The deliberations and findings of the courts in dealing with the private heterosexual conduct of teachers are as complicated by the vagueness of such terms as "immorality" and "fitness" as were the proceedings described in the previous comments on cases involving homosexual behavior. Clay, commenting in *The Kentucky Law Journal* on the sexual conduct of teachers as a cause for dismissal, elaborates not only on the vagueness problem but stresses the wide range of judicial discretion resulting from the absence of definitive Supreme Court rulings.[27] Accordingly, the personal values of the judges have a rather large "grey area" in which to function. The decisions in *Sullivan v. Meade County Independent School District No. 101*,[28] *Brown v. Bathke*,[29] and *Drew v. Andrews Municipal Separate School District*[30] are instructive in this respect. In *Sullivan*, the Eighth Circuit, employing the balancing test of *Pickering*,[31] found that any rights of privacy or association allowing an unwed teacher to live with her boyfriend were outweighed by the interest of the state in maintaining a "proper moral scholastic environment." Similarily, in *Bathke*, a federal district court in Nebraska saw a "rational relationship" between an unwed junior high school teacher's pregnancy and the decision of the school board not to allow her to continue to teach. "Such continuance," the court declared, "would be viewed by the students as a condonation . . . of pregnancy out of wedlock."[32] Additionally, the court underscored the interests of the school relative to the "social values" of junior high students as weighed against the interests of the teacher. In contrast, however, was the almost simultaneous decision in *Drew* holding that the denial of employment to two unwed mothers, as teachers aides, was based on an unwarranted and impermissible presumption of immorality.

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[26] Gish v. Board of Educ. of the Borough of Paramus, 145 N.J. 96, 104, 366 A.2d 1337, 1342 (1976).

[27] Clay, *The Dismissal of Public School Teachers for Aberrant Behavior*, 64 Ky.L.J. 911, 927 (1975-76).

[28] 530 F.2d 799 (8th Cir. 1976).

[29] 416 F. Supp. 1194 (D. Neb. 1976).

[30] 507 F.2d 611 (5th Cir. 1975), *cert. denied*, 475 U.S. 559 (1976).

[31] Pickering v. Board of Educ., 391 U.S. 563 (1968).

Further elements noted by Clay as frequently determinative in the dismissal of teachers are found in a number of recent cases involving out-of-school heterosexual conduct. The "status of the parties involved, the proximity or remoteness in time of the misconduct . . ., the degree of notoriety . . . attained, . . . likelihood of repetition, and the nature of the offense"[33] appear to be the consistently recurring guidelines.

An example is found in the 1977 Florida case of *Boyette v. State of Florida Professional Practices Council*[34] in which a high school physical education teacher contested the action of the Professional Practices Council in revoking his certification after finding that he had "forcibly raped" another teacher. The appellant had invited an unmarried female teacher to his trailer where they dined. Afterwards, they began kissing on the couch. The female teacher claimed that Boyette had forcibly taken her to the bedroom where they had intercourse. The latter fact was not denied by Boyette but he claimed that, while insistent, he was not forcible. After this portion of the episode, the girl called her roommate but said nothing about what had happened. Further testimony established that after the phone call, the pair again had intercourse. The appellant then drove the teacher home where she told her roommate of the incident.

In suppressing the revocation order, the court found that it "was not supported by competent substantial evidence" which established rape.[35] The court also took notice of the fact that the allegations had not been made until some time after the incident and that it was known in the community only after the Professional Practices Council began its investigation. Any diminished effectiveness of the teacher, the court said, was a result of this action. Apparently, the aforementioned elements of status of participants, remoteness in time, notoriety attained, and nature of the offense entered into the deliberations of the court.

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[32] Brown v. Bathke, 416 F. Supp. 1194, 1198 (D. Neb. 1976).

[33] Clay, *supra* note 27, at 931.

[34] 346 So. 2d 598 (Fla. 1977).

[35] *Id.* at 601.

Considerably different conclusions were reached by the court in a Delaware case involving an administrator who had been dismissed on grounds of "immorality" and "neglect of duty."[36] The charges grew out of an affair that took place for a period of one and one-half years between the plaintiff and a married woman. Much of the time spent in the relationship was spent during his working hours. It was also established that after the woman's husband had been transferred to Georgia, the plaintiff had attempted to "blackmail" him into permitting her to remain in Delaware by sending him a nude photo of her accompanied by a threat to send the photo to the husband's employers. In this suit, the plaintiff sought relief under § 1983 alleging denial of substantive and procedural due process, and additionally charging statutory and contractual violations. Finding the school board decision "reasonable in the light of the whole record," the court held that both the "immorality" and "neglect of duty" charges were substantially supported.[37] The court further noted that there was no overriding privacy right involved. The claim of the plaintiff that there was no "rational relationship" between his conduct and his job performance was also defeated by the "whole record." The court pointed out that the charge of immorality was supported by facts which alone would have been sufficient grounds for dismissal.

Sedule contrasts markedly with the 1974 *Erb* case[38] in which an adulterous relationship entered into by a popular teacher was seen by the Iowa Supreme Court as not providing sufficient grounds for revocation of certification since it was an admitted mistake and an "isolated instance" in an otherwise unblemished past not likely to recur.[39] Again, effect on job performance, duration, likelihood of recurrence, and status appear to be important determinants. In *Sedule*, job performance was seen as affected, the relationship was sustained over a long period of time, and the plaintiff persisted in attempting to maintain it. Whether his status as an administrator was a determinant is not clear.

TEACHER RELATIONSHIPS WITH MINOR STUDENTS

In no area of litigation related to the sexual conduct of teachers does the status of the participants figure more largely than in teacher-student relations. Dismissal appears inevitable for improper relations with minor students. One of the most recently reported instances resulting in dismissal occurred in an out-of-school setting in the case of

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[36] Sedule v. The Capital Sch. Dist., 425 F. Supp. 552 (D. Del. 1976).

[37] *Id.* at 555.

[38] Erb v. Iowa State Bd. of Pub. Instruction, 216 N.W. 2d 339 (Iowa 1974).

[39] *Id.* at 344. It should be noted that *Erb* deals with a revocation action which the courts undoubtedly will scrutinize more closely than a dismissal, as in *Sedule*.

Carrao v. Board of Education, City of Chicago.[40] While accompanying a mother and her five children on a vacation trip as a friend of the family and former teacher of some of the children, the teacher plaintiff was accused of molesting the eight-year-old daughter. The child reported to her mother that he had fondled her while she was sleeping in his tent trailer adjacent to the family cabin. The children, with permission of the mother, had frequently slept there. According to the mother, the plaintiff stated: "I must have been dreaming"[41] when she confronted him about the incident. She also testified that he wrote a letter of apology after leaving the vacation site. He then returned to the area several days later, leaving several bags of groceries at the temporarily unoccupied cabin, along with a note expressing a desire to talk with her. The mother reported his presence in the area to the sheriff who went to the plaintiff's motel where, on seeing the sheriff, he reportedly stated: "I know I shouldn't have did (sic) it."[42]

The court found that the dismissal by the school board for "conduct unbecoming a teacher" was based on "sufficiently specific" evidence. No procedural discrepancies were found in the hearing procedures despite the allegations of the teacher with respect to the testimony of two of the children and the functioning of the board's attorney in dual roles as prosecutor and advisor to the board. The statements of the teacher to the mother and to the sheriff, the letter of apology, and the later seemingly conciliatory attempt to contact the mother satisfied the court concerning the correctness of the board's action in dismissing the plaintiff.

The widely-reported *Weissman v. Board of Education,*[43] involving the "sexually provocative conduct" of a male high school teacher while on a field trip with minor female high school students, also leaves little doubt as to what the courts see as the proper relationship between a teacher and minor students and its direct bearing on the teacher's "fitness." In affirming the trial court's decision sustaining the teacher's dismissal, the Colorado Supreme Court noted that "a strong presumption of unfitness arises against the teacher" under such circumstances.[44]

Similarily, in *Obermeyer v. School Board of Independent School District No. 282,*[45] the Minnesota Supreme Court upheld the dismissal of a teacher for immoral conduct after he had admitted and was convicted of taking liberties with a minor male student. The teacher attempted to rely on a Minnesota statutory disability provision which would have provided leave for treatment of his alcoholism—presumably the cause of the conduct involving the minor. The court ruled that such provision does not preclude the applicability of other statutes relating to dismissal for immoral conduct.

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[40] 360 N.E. 2d 536 (Ill. App. Ct. 1977).

[41] *Id.* at 539.

[42] *Id.*

[43] 547 P.2d 1267 (Colo. 1976).

[44] *Id.* at 1273.

[45] 247 N.W. 2d 919 (Minn. 1976).

It continues to be apparent, then, that the courts are quite consistent in their rulings on what constitutes unacceptable teacher relationships with minor students. Less certain is how such a test as "fitness" might vary with the age and maturity of the students involved, but it is probably safe to assume that such other factors as status, notoriety, and impairment of performance would be considered.[46]

NON-SEXUAL "IMMORALITY"

Charges of immorality against teachers have not been restricted to instances alleging sexual misconduct. Perhaps one of the most imaginative constructions of the term was in the well-known case of *Watts v. Seward*[47] in which the charge of immorality was used to describe the political activity of two teachers who had supported political opponents of the superintendent. Of more recent vintage are two cases involving illegal gambling and driving while intoxicated. In the first instance, *Baker v. School District of the City of Allentown*,[48] the teacher was dismissed by the school board on grounds of "immorality and incompetency" after pleading *nolo contendere* to a charge of running an illegal gambling operation. In appealing to the courts, the teacher argued a lack of sufficient evidence. In ruling for the board, however, the court found substance to its claim that the moral standards of the community had been offended. An additional contention by the plaintiff claiming statutory vagueness was also disallowed. "It would be unrealistic," the court noted, "to require the Commonwealth to define every immoral act."[49]

On the other hand, three convictions of a teacher for driving while intoxicated and for failing to have a valid driver's license did not establish "immorality, unfitness, incompetence, or violation of the adopted policies of the school board" under Montana codes in the case of *Lindgren v. Board of Trustees, High School District No. 1.*[50] The Supreme Court of Montana found such grounds legally deficient since, in its view, the convictions did not automatically substantiate the conclusions of the board.

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[46] For an unusual case that can hardly be considered as involving sexual "conduct," *see* Grossman v. Bernards Township Bd. of Educ., 538 F. 2d 319 (3rd Cir. 1976), *cert. denied*, 45 U.S.L.W. 3302 (1976) wherein the "incapacity" of a tenured elementary school music teacher was established after a sex reassignment operation from male to female. "Incapacity" was broadly interpreted by the court as encompassing the possible emotional and psychological impact on students in their formative years.

[47] 454 P.2d 732 (Alas. 1969) *cert. denied*, 398 U.S. 928 (1970).

[48] 371 A.2d 1028 (Pa. Commw. Ct. 1977).

[49] *Id.* at 1029.

[50] 558 P.2d 468 (Mont. 1976).

DRUG-RELATED OFFENSES

The foregoing cases serve to illustrate the efforts of the schools to establish and preserve what was referred to in *Sullivan* as "the proper scholastic moral environment."[51] This concern is obviously not limited to the scrutiny of the previously described conduct. Instances of drug abuse, as well as the expression of unpopular views about drug usage, also typically move school authorities to seek teacher dismissal. This is especially true in cases involving a conviction.

Dismissal does not appear to be automatically warranted in all situations, however, as evidenced by two 1977 cases. In the most notable of these, *Bogart v. Unified School District No. 298 of Lincoln County, Kansas,*[52] a U.S. district court found a teacher's property and liberty interests at stake. The teacher had been convicted in a jury trial of possession of marijuana after he had somewhat hesitantly attempted to conceal the drug to protect his son whose arrest on related charges was imminent. He had, however, freely surrendered the marijuana to authorities when they arrived at his home. In view of the circumstances, the presiding judge acquitted the teacher "notwithstanding the verdict." Initially, the school board had voted for dismissal on the basis of the conviction. In a second hearing, the board affirmed its earlier decision offering no new reasons. The federal district court based its holding for the plaintiff-teacher on a property right under Kansas tenure and continuing contract laws. The court also ruled that a liberty interest was involved since the teacher had sought and failed to obtain other employment "within a reasonable distance."[53] The court also noted that the initial dismissal action by the school board was based in part on some doubts expressed by the teacher about the harmful effects of marijuana—an impermissible basis, in the view of the court, for the board's decision. The court also ruled that the mental conflict expressed by the teacher between obeying the law and protecting his son did not provide any further justification for board action.

In a similar case, *Governing Board of Rialto Unified School District v. Mann,*[54] the California Supreme Court invoked a recently adopted state statute which, in part, precludes the revocation of employment rights of persons convicted of certain marijuana offenses prior to 1976, as long as two years have elapsed from time of conviction. At issue was a teacher's dismissal by the school district for a 1971 marijuana conviction. Dismissal in this instance was based on that section of the *California Education*

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[51] Sullivan v. Meade County Independent Sch. Dist. No. 101, 530 F.2d 799, 800 (8th Cir. 1976).

[52] 432 F. Supp. 895 (D. Kan. 1977).

[53] *Id.* at 903.

[54] 135 Cal. Rptr. 526, 558 P.2d 1 (1977).

Code which stipulates conviction of a felony or moral turpitude as grounds for such action. On the basis of the new statute, the court overruled the dismissal.

In a 1976 New Mexico case, a somewhat different view was taken by public school officials and the court regarding a teacher's past conviction and present attitude. In *Bertrand v. New Mexico State Board of Education*,[55] a first-year special education teacher was nonrenewed after school officials learned that she had been convicted of distributing marijuana while in college. While the teacher had made no false statements at the time of employment, neither had she volunteered any information relative to the offense or to the fact that she was on a one-year probationary sentence. Since the board had given no reasons for its nonrenewal action, the teacher appealed the decision to the state board of education. The ruling of the state board hinged on the New Mexico Criminal Offender Employment Act which provides that the termination of employment in such instances must be based on evidence that the former offender has not been rehabilitated or that the conviction is related, in a detrimental way, to job performance. Testimony established that derogatory remarks were made by the teacher to her probation officer about drug laws and "narcs." She further was reported to have made similar comments about the laws to a student who had asked her advice about drug usage and she reportedly cautioned him about getting into trouble but "to do what he wanted." On the basis of these comments, the state board concluded that "Bertrand has not been sufficiently rehabilitated to warrant the public trust."[56] With respect to the job relatedness of the conviction, the state board found that "Bertrand's criminal conviction directly relates to her employment, or profession as a teacher."[57] In affirming, the appellate court found sufficient evidence to support the conclusion that the teacher was not sufficiently rehabilitated. Referring to the substance of the second conclusion relative to the relationship of the conviction to the job, the court noted that the state board "merely recited the language of the statute."[58] Some doubt must be expressed regarding the outcome in the court given the absence of the disparaging remarks of the teacher and the vagueness of the state board in establishing "relatedness."

In all of the instances noted, conviction of a drug-related offense, alone, was insufficient to justify automatic dismissal. While public concern with potential drug abuse by teachers is obviously justified, it is also evident that the courts must look to the statutory and constitutional correctness of dismissal or other punitive actions.

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[55] 88 N.M. 611, 544 P.2d 1176 (1976).

[56] *Id.* at 614, 544 P.2d at 1179.

[57] *Id.*

[58] *Id.* 88 N.M. at 615, 544 P.2d at 1180.

RESIDENCY REQUIREMENTS

What is perhaps mildly surprising in reviewing court-sanctioned regulation of teacher's private activities is the mood of acceptance of school board-imposed residency requirements. Despite the supposed impact of such earlier rulings as *Donnelly v. Manchester*[59] in which the New Hampshire Supreme Court held that "the right of every citizen to live where he chooses and to travel freely not only within the state but across its borders is a fundamental right which is guaranteed by our own and the Federal Constitution,"[60] the courts generally appear to view such restrictions as not unreasonable. Some exceptions will be noted,but what has emerged as the principal determinant of the validity of such requirements is the "rational basis" test. In teacher-related cases, what constitutes a "rational basis" for residency is elaborated nowhere better than in the well-known case of *Wardwell v. Board of Education, City School District of the City of Cincinnati.*[61] In this 1976 decision by the Sixth Circuit Court of Appeals, the "rational basis" advanced by the school district and accepted by the court is premised on the following: aids in hiring teachers who are highly motivated and deeply committed to an urban educational system; teachers who live in the district are more likely to vote for district taxes, less likely to engage in illegal strikes, more likely to help obtain passage of school tax levies, more likely to be involved in school and community activities, more likely to gain sympathy and understanding for the racial, social, economic, and urban problems and thus less likely to be considered isolated from the communities; the requirement is in keeping with the goal of encouraging integration.[62] In accepting the general validity of the reasons given it was not necessary, in the view of the court, to establish whether or not a "compelling state interest" was served which outweighed any individual rights involved. A showing that the requirement was not unreasonable sufficed—a ruling partially at odds with a federal district court ruling in the earlier case of *Hanson v. Unified School District No. 500, Wyandotte County, Kansas.*[63] At issue in *Hanson* was a county residency requirement as a condition of employment. In reviewing the equal protection aspects, the court looked to the "character of classificiation in question" (resident-nonresident), "individual interests affected," and the "government interest asserted."[64] The court concluded that there was no "reasonable basis" for assuming that teacher effectiveness is improved by residency, that the resident-nonresident distinction was arbitrary and, therefore, violative of the 14th amendment, and that whatever "infinitesimal government interest" was present did not justify interference with teachers' rights.[65] However, in rendering judgment, the court cautioned that the finding "does not mean that a state may not in an 'appropriately defined class of positions' require residency as a qualification for employment."[66]

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[59] 111 N.H. 50, 274 A.2d 789 (1971).

[60] *Id.* at 51, 274 A.2d at 791.

[61] 529 F.2d 625 (6th Cir. 1976).

[62] *Id.* at 628.

[63] 364 F. Supp. 330 (D. Kan. 1973).

[64] *Id.* at 332.

[65] *Id.* at 332.

The lack of difficulty on the part of the courts in finding a "rational basis" is further evidenced in the Tenth Circuit's 1976 decision in *Mogle v. Sevier County School District.*[67] The residency requirement was upheld even though the court recognized that the supporting "rational basis" of availability, community involvement, and access to school records was probably delineated only after the policy was contested by a nonrenewed counsellor.

A recent exception to this trend in court rulings on residency should be noted. In the 1977 case of *Guithues v. Merritts,*[68] an Illinois county circuit court apparently held a school district "resolution" on residency unconstitutional, as violative of both the 14th amendment and § 1983. The case involved the termination of noncertified, nontenured school attendance officers who had moved from the district. Contested on appeal was the trial court ruling in which the presiding judge had refused reinstatement despite his ruling on the constitutional issue. The appeals court assumed from the somewhat unclear language of the circuit court that the regulation had been declared unconstitutional and found that the plaintiffs failed to invoke that question in their complaint. Thus limited, the inquiry of the appeals court focused on the procedural violation and the property interest asserted. In the light of *Roth,*[69] the appeals court found no procedural deficiency in the failure of the board to grant a hearing to nontenured yearly contract employees. With respect to a property interest, the court again invoked *Roth* and found only an "abstract need or desire" which is insufficient to establish a property interest.[70]

The federal courts, however, continue to reflect the "validity of appropriately defined and uniformly applied bona fide residence requirements" for public employees as accepted by the United States Supreme Court in *McCarthy v. Philadelphia Civil Service Commission.*[71] With respect to teachers, the "rational basis," centered on community involvement, may well have considerable and far-reaching implications.

OTHER ACTIVITIES

A variety of other out-of-school teacher interests and involvements have recently invoked public scrutiny. Cases reported continue to document the concern of school officials with such activities as outside employment, choice of schools for children, private and public life style, political association, and expressions of opinion.

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[66] *Id.*

[67] 540 F.2d 478 (10th Cir. 1976).

[68] 363 N.E.2d 134 (Ill. App. Ct. 1977).

[69] Board of Regents of State College v. Roth, 408 U.S. 564 (1972).

[70] *Id.* at 577.

[71] 424 U.S. 645 (1976).

The instance of outside employment is exemplified by *Gosney v. Sonora Independent School District.*[72] The purchase of a department store by a school principal and his teacher-wife inspired the school board to not renew their contracts because of "their growing business interests and involvement (sic)."[73] In holding for the board, the court noted that while other teachers in the school "moonlighted," none was involved to an extent to "approximate the responsibilities or tasks imposed upon the plaintiffs when they purchased the store."[74] No constitutional right to private employment while teaching was seen.

Freedom of choice for teachers in choosing schools for their children was also tested. In *Cook v. Hudson,*[75] the question of whether teachers can be required to send their children to public schools as a condition of employment has apparently been resolved. Although the Fifth Circuit Court of Appeals found a "rational relationship" between the school board policy and the school desegregation plan, the United States Supreme Court pointed to the Mississippi statute which precludes "denying employment or reemployment to any person . . . for the single reason that the eligible child of such person does not attend the school system in which such person is employed."[76] Since the right of the appellant teachers to send their children to a racially segregated academy was involved, the Supreme Court also invoked a prior holding prohibiting discriminatory admission procedures by such schools.[77]

A broadly based incursion by a Wyoming school board into a nontenured teacher's life style failed when a jury found that the "teacher's physical size, lack of church attendance, location of her trailer, and conduct of her personal life" were "constitutionally impermissible" bases for nonrenewal.[78] Damages against the board members were precluded in an apparently *Wood*-based decision since no "wanton or oppressive conduct" was established.

Two cases involving association with the American Civil Liberties Union (ACLU) which are worthy of note are *Murray v. Wagle*[79] and *Woodward v. Hereford Independent School District.*[80] In the light of *Mt. Healthy City School District Board of Education v. Doyle,*[81] the Ninth Circuit Court of Appeals remanded *Murray,* the case of a teacher who claimed that his "ineffectiveness" was established only after his ACLU activities evoked the displeasure of his superiors. *Doyle* requires sufficient evidence, apart from the protected activity of the teacher to support the termination action of the school district. The evidence in *Woodward,* on the other hand, convinced a federal district court in Texas that a teacher's ACLU association led to his nonrenewal. The court ordered reinstatement, back pay, and attorney fees, noting that the defendant's action was "unreasonable and obdurately obstinate."[82]

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[72] 430 F. Supp. 53 (N.D. Tex. 1977).
[73] *Id.* at 57.
[74] *Id.* at 59.
[75] 97 S. Ct. 543 (1977).
[76] Miss. Code Ann. § 37-9-59 (Mar. 27, 1974).
[77] Runyon v. McCrary, 96 S. Ct. 2586 (1976).
[78] Stoddard v. School Dist. No. 1, Lincoln County, Wyo., 429 F. Supp. 890, 891. (D. Wyo. 1977).
[79] 546 F.2d 1329 (9th Cir. 1976), *cert. granted,* 45 U.S.L.W. 3777 (U.S. May 31, 1977) (No. 76-1447).
[80] 421 F. Supp. 93 (N.D. Tex. 1976).
[81] 429 U.S. 274 (1977).

Political activity also caused difficulty for teachers in recent cases. Teachers in Kentucky were subjected to transfers and demotions after supporting a political opponent of the school superintendent in a board election.[83] The court, however, did not allow the retaliatory action. Similarly, in a Texas case, *Guerra v. Roma Independent School District,*[84] the court revoked the disciplinary action of a school board which refused to rehire two teachers and placed two others on probation because of their support of a political opponent of the board. Damages were also awarded.

The *Pickering* rationale was applied in the case of a teacher who was dismissed after writing an article for a university class.[85] The article was critical of the operation of the school district. The Nevada Supreme Court found that the article "did not produce any harmful disorganization or chaos among students, teachers, or administrators and did not adversely affect the teacher's ability to teach . . ."[86] However, the case turned primarily on the school district's failure to meet a statutory requirement for admonishment prior to dismissal.

CONCLUSION

Obviously, only broad generalities can be offered in summary. The extent to which teachers can be disciplined for the private conduct of their lives is usually conditioned by such factors as the status of the participants in the disputed involvement, its recency, the attendant degree of notoriety, and the likelihood of recurrence of the objectionable behavior. Although tempered by differing value systems in various jurisdictions, "tests" of "relatedness," "fitness," and "impairment" are typically applied by the courts, as well as efforts to weigh the "balance" between the public's interest and the interests of individuals. It should be noted that the mere displeasure of school officials with teacher's outside activities is not a sufficient basis for punitive measures.[87] Recent United States Supreme Court remands in the light of *Doyle,* on the other hand, appear to be most significant in such cases.[88] The lower courts are apparently required to first look to see if a valid basis for action exists on other grounds even though constitutionally protected behavior is involved in a punitive action. From the standpoint of the teacher, it would appear that in-school performance should be such as to provide no basis which would justify retaliatory action for disapproved out-of-school activity.

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[82] Woodward v. Hereford Independent Sch. Dist., 421 F. Supp. 93, 98 (N.D. Tex. 1976).

[83] Calhoun v. Cassady, 534 S.W.2d 806 (Ky. 1976).

[84] School Law News 10 (Sept. 2, 1977).

[85] Board of Sch. Trustees, Clark County Sch. Dist. v. Rathbun, 556 P.2d 548 Nev. 1976).

[86] *Id.* at 549.

[87] *See e.g.*, Baker v. School Dist. of Allentown, 371 A.2d 1028, 1029 (1977) where the court notes that a school board may not impose its conception of morality on a community by dismissing employees for conduct which merely incurs its disapproval.

[88] Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).

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Teachers and the Courts: School-Related Activities

ROBERT BARTMAN
SUPERVISOR OF SCHOOL LAWS
MISSOURI STATE DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION

This past decade has seen an intensification of the struggle between those forces representing the authority of the board of education to govern public schools and those advocating the individual rights of teachers to continue their employment in a relatively restriction-free environment. As these forces collide, the aggrieved party frequently files an action either claiming violation of first or fourteenth amendment rights or charging the violation of the school code or a breach of contract. This paper focuses on cases in which the employee alleges constitutional violations.

BACKGROUND

The landmark decisions of *Board of Regents v. Roth*[1] and *Perry v. Sindermann*[2] provide the needed background for this discussion.

In the *Roth* decision, Justice Stewart, quoting McReynold's opinion in *Meyer v. State of Nebraska*,[3] delineated some interests protected by the liberty clause of the fourteenth amendment:

> While this court has not attempted to define with exactness the liberty . . . guaranteed (by the Fourteenth Amendment) the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.[4]

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[1] 408 U.S. 564 (1972).
[2] 408 U.S. 593 (1972).
[3] 262 U.S. 390 (1923).
[4] Board of Regents v. Roth, 408 U.S. 564, 572 (1972).

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> Where a person's good name reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard is essential.[5]

Thus, the United States Supreme Court clearly identified a protected interest for teachers in "liberty" but clearly did not delineate the parameters of that interest. Statements made against a teacher seriously damaging his standing and association in the community are the key to a determination of whether a protected interest in liberty exists. The touchstone in determining fourteenth amendment liberty interest violations is the severity of the injury.

In *Sindermann*, the court noted first amendment considerations. Robert Sindermann alleged that his contract was not renewed because of his public utterances at legislative hearings advocating the elevation of the college to a four-year school and his statements to the press criticizing the regents.

Justice Stewart, again speaking for the court, stated:

> For at least a quarter-century, this court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.[6]

Since the advent of *Roth* and *Sindermann*, there have been many creative attempts to broaden the scope of the first and fourteenth amendments to provide protection for teachers who do not have a property interest in continued employment fixed by state statutes. It is in the context of the liberty interest enunciated in *Roth* and the first amendment concerns expressed in *Sindermann* that substantive issues raised in recent court decisions affecting teachers will be discussed.

FOURTEENTH AMENDMENT LIBERTY INTEREST

Reputation and Valuable Government Benefit

If it can be said that the concept of liberty interest among teachers budded with *Meyer* yet did not blossom until *Roth*, it surely can be said to have been pruned in the United States Supreme Court's decision in *Bishop v. Wood*.[7] Although the factual situation dealt with the discharge of a policeman, the rationale may be broadly applied to other public employees, including teachers. The policeman's dismissal was based on a failure to follow certain orders and poor attendance at police training classes, resulting in low morale and conduct unsuited to an officer. The officer alleged that the reasons given for his discharge were false and were so serious as to constitute a stigma that may severely damage his reputation in the community. Since the district court granted summary judgment, the Supreme Court accepted the officer's contention that the charges were false. Since the Court dealt with a property right to employment as a separate question, assuming that the reasons for discharge were false, the central issue for this inquiry is whether that false explanation deprived the plaintiff of an interest in liberty protected by the fourteenth amendment.

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[5] *Id.* at 573.

[6] Perry v. Sindermann, 408 U.S. 593, 597 (1972).

[7] 96 S. Ct. 2074 (1976).

The Court held that there was no violation of a liberty interest in "the discharge of a public employee whose position is terminable at the will of the employer when there is no public disclosure of the reasons for the discharge."[8]

Justice Stewart, writing for a divided Court, concluded that:

> In this case, the asserted reasons for the City Manager's decision were communicated orally to the petitioner in private and also were stated in writing in answer to interrogatories after this litigation commenced. Since the former communication was not made public, it cannot properly form the basis for a claim that petitioner's interest in his "good name, reputation, honesty, or integrity was thereby impaired." And since the latter communication was made in the course of a judicial proceeding which did not commence until after petitioner had suffered the injury for which he seeks redress, it surely cannot provide retroactive support for his claim.[9]

Justice Brennan was unimpressed with the majority opinion and, in a fiery dissent, laid to rest the liberty clause of the fourteenth amendment:

> Today the court effectively destroys even that last vestige of protection for "liberty" holding that a State may tell an employee that he is being fired for some nonderogatory reason, and then turn around and inform prospective employers that the employee was in fact discharged for a stigmatizing reason that will effectively preclude future employment.[10]

Although decided a month before *Bishop*, in a case involving the termination of an acting principal, Claude Huntley, for alleged racial discrimination, the conclusion of the court of appeals would appear to indicate how ingrained the concept of liberty is in our jurisprudence and that Justice Brennan's pessimism is perhaps unwarranted.[11] The court rejected the principal's allegation of discrimination, along with his contention that he had a protected property right in his position. However, the charges which formed the basis for his discharge were read publicly at a board meeting and included the allegation that he "failed to demonstrate that quality of leadership necessary to effectively deal with the educational program; that he was responsible for the rapid deterioration of the school; that he 'had not provided for the basic safety of the children and staff;' and that his 'leadership' had created a climate of confusion and discontent."[12] Although the evidence, including the fact that Huntley presided over some 39 fires in his building, overwhelmingly supported the charges, the court concluded that such public statements stigmatized Huntley within the meaning of *Roth* and therefore, he was entitled to a hearing. The court remanded the case to the district court for a determination of appropriate relief.

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[8] *Id.* at 2079.
[9] *Id.*
[10] *Id.* at 2081.

Importantly, the court distinguished the *Huntley* case from *Paul v. Davis*[13] in which two county police officials distributed a leaflet to local merchants containing the names and pictures of persons designated as active shoplifters. Persons on the list had been charged but never convicted of shoplifting. The Supreme Court held that the plaintiffs had not been deprived of any "property" or "liberty" protected by the fourteenth amendment. The Court stated, "[w]e think that the weight of our decisions establishes no constitutional doctrine converting every defamation by a public official into a deprivation of liberty within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment."[14] In the *Huntley* case, the public statement of charges against Huntley "occurred in the course of termination of employment . . . and, that, as a direct result, he will be denied future employment."[15]

A federal district court attempted to formalize the criteria for establishing a liberty interest in *Stevens v. Joint School District.*[16] Upon request, a board granted a hearing to a nontenured teacher concerning written charges which included inadequacies generally dealing with classroom discipline, absence from class, ridicule of children, and strained relationships with children. The court held that in determining whether the teacher had a liberty interest, the following must be considered: the falseness of the charges; whether the charges had a stigmatizing effect, *i.e.*, foreclosure of future employment opportunities; and whether there was public disclosure of those charges. In this instance, the court held for the teacher.

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[11] Huntley v. Community Sch. Bd. of Brooklyn, 543 F.2d 979 (2d Cir. 1976).
[12] *Id.* at 985.
[13] 424 U.S. 693 (1976).
[14] *Id.* at 702.
[15] Huntley v. Community Sch. Bd. of Brooklyn, 543 F.2d 979, 985 (2d Cir. 1976).
[16] 429 F. Supp. 477 (W.D. Wis. 1977).

Another thread weaving itself through court considerations of liberty interest is the severity of the penalty imposed by the state. Mere defamation by a governmental official is not substantial enough to call into play fourteenth amendment protections. In *Sullivan v. Brown*,[17] a Tennessee teacher was reprimanded and transferred to another high school for admittedly discussing sex-related topics in her class, excessive tardiness, and the use of profanity in the presence of her students. The court ruled, in part, on the question of liberty interest:

> The concept of liberty recognizes two particular interests of a public employee: 1) the protection of his or her good name, reputation, honor, and integrity, and, 2) his or her freedom to take advantage of other employment opportunities. The charges made must be of a nature as to damage seriously his or her standing and association in the community.[18]

In *Sullivan*, the court concluded that where a transfer occurred without a termination of employment or reduction in compensation, there is no due process right coupled with charges against the teacher. The teacher, in this instance as in *Paul v. Davis*, had an interest in reputation but not a guarantee of present enjoyment of reputation. This type of interest in reputation must be processed through the state courts as a tort claim.

Regulating Personal Appearance

Personal appearance regulations present another broad area of challenge to what some would allege is a liberty interest. A federal circuit court sustained the nonrenewal of a nontenured teacher's contract in *Tardif v. Quinn*.[19] The district court accepted the board's stated reasons, including a lack of interest in professional growth as sufficient grounds for the dismissal. The teacher appealed contending that the reason for the dismissal was her short skirts. The appellate court held that the nonrenewal was permissible even if the real reason was the teacher's dress length or, in the words of the court, "over exposure." Thus, the court refused to raise skirt lengths to a constitutional issue.

This decision contrasts with some of the earlier cases dealing with facial hair. Although some courts have considered wearing a beard a constitutionally-protected liberty,[20] other courts have been reluctant to include it as a constitutional right and have ruled that such restrictions on the freedom of a teacher to represent his personality by wearing facial hair was arbitrary,[21] or the restriction was administered in an arbitrary manner.[22]

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[17] 544 F. 2d 279 (6th Cir. 1977).
[18] *Id.* at 283.
[19] 545 F.2d 761 (1st Cir. 1976).
[20] *See, e.g.*, Braxton v. Board of Pub. Instruction, 303 F. Supp. 958 (Fla. 1969).

However, more recently, the Supreme Court of Tennessee, in *Morrison v. County Board of Education,*[23] rejected a bearded discharged teacher's claim that a board regulation providing in part that "[n]o apparel, dress, or grooming that is or may become potentially disruptive of the classroom atmosphere or education process will be permitted" interfered with his constitutional liberty to wear a beard.

Finally, the United States Supreme Court, in *Kelly v. Johnson,*[24] ruled that under certain specified instances, the state could make and enforce restrictive grooming codes. The test placed on such regulations, "where the claim implicates only the more general contours of the substantive liberty interest protected by the Fourteenth Amendment,"[25] is whether the individual can demonstrate that there is no rational connection between the regulations and the promotion of safety of persons and property. In addressing the county police department's decisions to adopt a dress code, the court maintained that "[t]his choice may be based on a desire to make police officers readily recognizable to the members of the public, or a desire for the esprit de corps which such similarity is felt to inculcate within the police force itself."[26] The court held that either purpose was a sufficient rational justification for regulations so as to defeat the policeman's claim based on the liberty guarantee of the fourteenth amendment.

The full impact of the *Kelly* decision on school districts is unknown. However, the circuit court in *Tardif* relied in part on *Kelly* in sustaining a board's dismissal of a teacher for reason of dress. It would appear that a board may adopt reasonable grooming codes which are applied equitably and which can be defended on the basis of some educationally sound rationale.

Contrary to Justice Brennan's exhortations in *Bishop*, a teacher does have a liberty interest in protecting his or her good name, reputation, honor and integrity when that interest is affected by publicly stated reasons for discharge which jeopardize a valuable governmental benefit. Clearly, governmental employment is a valuable governmental benefit. However, recent decisions suggest that the fourteenth amendment may have been stripped of encompassing any liberty interest in dress, shaved of guaranteeing a protected right to face hair, and trimmed neatly of guaranteeing a protected interest in hair style.

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[21] *See, e.g.*, Conard v. Coolsby, 350 F. Supp. 713 (Miss. 1972).
[22] *See, e.g.*, Ramsey v. Hopkins, 320 F. Supp. 477 (Ala. 1970).
[23] 494 S.W.2d 770, 771 (S. Tenn. 1973).
[24] 425 U.S. 238 (1976).
[25] *Id.* at 245.
[26] *Id.* at 248.

FIRST AMENDMENT

Teacher Utterances

First amendment claims continue to provide teachers with a forum in which to challenge school board actions restricting their employment environment. The Supreme Court, in *Sindermann*, summarized precedent cases establishing that a valuable governmental benefit cannot be denied an individual for his exercise of first amendment rights. In a more recent landmark decision, *Mt. Healthy City School District v. Doyle*,[27] the Supreme Court refined this doctrine. A nontenured teacher was advised of the nonrenewal of his contract by the board after he had an argument with another teacher which culminated in the other teacher's slapping him, had an argument with employees of a school cafeteria over the amount of spaghetti which he had been served, referred to students as "sons of bitches," made an obscene gesture to two girls, and telephoned a radio station to divulge the contents of a memorandum to teachers concerning a faculty dress code. Upon request, he received reasons for the board's failure to renew his contract. The reasons included his lack of tact in handling professional matters leaving doubt as to his sincerity in establishing good school relationships. Specific reference was made to the radio station incident and to the obscene gesture incident.

The Court, quoting from *Pickering*,[28] maintained:

> That question of whether speech of government employee is constitutionally protected expression necessarily entails striking a balance between the interests of the teacher as a citizen in commenting upon matters of public interest and of the state, as an employer, in promoting the efficiency of public services it performs.[29]

The Court did not question the district court's finding that the communication with the radio station was protected by the first and fourteenth amendments. The Supreme Court rejected the district court's contention that the fact that protected conduct played a substantive part in the actual decision not to renew a contract necessarily amounted to a constitutional violation justifying remedial action.

Justice Rehnquist, writing for the majority, stated:

> A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than

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[27] 97 S. Ct. 568 (1977).

[28] Pickering v. Board of Educ., 391 U.S. 563 (1968).

[29] Mt. Healthy City Sch. Dist. v. Doyle, 97 S. Ct. 568, 574 (1977).

> he would have occupied had he done nothing . . . The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct.[30]

The Court concluded that the initial burden was on the teacher to prove that the conduct was protected and that it was a motivating factor in the decision not to renew the contract. Once the teacher has sustained that burden, it must then be determined if the employing board would have reached the same decision absent the protected conduct.

In *Bernasconi v. Tempe Elementary School District*,[31] the Ninth Circuit Court reversed the transfer of a teacher to another position. Bernasconi alleged that she was transferred because she criticized the special education program and advised parents of Mexican-American students to consult the local legal aid society. She claimed these students were being erroneously placed in classes for the mentally retarded based upon tests given in English rather than in the student's native language. The school district alleged that the transfer was necessitated by a cut in funding and Bernasconi's position was being abolished. The school district argued that even if the court found that the reason for the transfer was partially in retaliation for the teacher's exercise of first amendment rights, the transfer resulted in no loss in pay or status; therefore, there was no loss of valuable governmental benefit. The court disagreed stating that "[t]he transfer of Bernasconi from a position uniquely suited to her talents and desires is precisely the kind of action that is proscribed by *Perry*".[32]

The court remanded *Bernasconi* to the lower court for a determination as to whether the board would have reached the same decision to transfer absent the teacher's participation in protected conduct.

Bernasconi may be contrasted with *Sullivan v. Brown*[33] where a court rejected a teacher's claim that a transfer denied her a valuable governmental benefit. Perhaps, the distinction is the nature of the transfer. *Sullivan* involved a strictly lateral transfer with no cut in pay and no change in duties. The teacher was to teach the same classes in a different building. In *Bernasconi*, the teacher had been uniquely suited for a bilingual counseling position and was transferred to a teaching position in an all white school.

In *Rocker v. Huntington*,[34] a court rejected a teacher's contention that she was not re-employed because of statements she made at a board meeting. The circuit court sustained the lower court's finding that the board had just cause to terminate the contract notwithstanding the free speech claim. The teacher's performance in the classroom simply did not measure up to the standards expected by the board.

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[30] *Id.* at 575.

[31] 548 F. 2d 857 (9th Cir. 1977).

[32] *Id.* at 860.

[33] Sullivan v. Brown, 544 F. 2d 279 (6th Cir. 1977).

[34] 550 F.2d 804 (2d Cir. 1977).

Academic Freedom

When a teacher's in-class activities are challenged, there is inevitably an attempt on the teacher's part to solidify the illusive term, academic freedom, within the protective domain of the first amendment. In *Carey v. Board of Education*[35] when a Colorado board disapproved of the use of ten books in a school, violation of academic freedom was charged. After disapproving of the books, the board disseminated a memo stating that the books will not be purchased or used for class assignments and individuals will not be given credit for reading any of them. The district court maintained that academic freedom was not a constitutional right, but that open communication, which is part of academic freedom, was protected by the first amendment. The court reasoned that a school board which granted both teachers and students freedom to explore contemporary literataure in an elective high school class could not subsequently impose its judgment on literature they chose to consider.

The court, however, looked past the first amendment right of the teacher to open communication. Through a collective bargaining agreement, the teachers surrendered their individual freedom of professionalism by allowing the board to establish material lists and by requiring prior board approval for use of material not on the list.

In *Harris v. Mechanicville Central School District*,[36] a controversy concerning an English teacher's use of the book *The Catcher in the Rye*, as classroom reading material, was at issue. During a conference with the principal, the teacher had agreed to discontinue the use of the book and that agreement was reduced to writing and given to the teacher. At a later date, the teacher again began using the proscribed book in his class. The board terminated the teacher for insubordination. The court held that although the teacher may have had a first amendment right to use *The Catcher in the Rye*, the violation of the agreement between the teacher and the principal constituted insubordination.

In both *Carey* and *Harris*, the teachers in a group or as individuals, waived whatever first amendment claims they may have had in agreements with the board or an administrator.

In another case involving claims of academic freedom violations, two Illinois teachers provided their eighth grade students with brochures promoting the movie *Woodstock* using poetry that could be summarized as "an alluring invitation and a beckoning for them to throw off the dull discipline imposed on them by the moral environment of their home life, and in exchange to enter into a world of love and freedom—freedom to use acid and grass, freedom to take their clothes off . . ."[37] The brochure's message was heavily sprinkled with anglo-saxon expletives.

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[35] 427 F. Supp. 945 (D. Colo. 1977).
[36] 382 N.Y.S.2d 251 (Sup. Ct. 1976).

The teachers alleged that they were being penalized for the exercise of first amendment rights, including their right of academic freedom. The court categorically rejected this claim stating:

> We do not believe that however much the reach of the First Amendment has been extended and however eager today's courts have been to protect the many varieties of claims to civil rights the appellee school board had to put up with the described conduct of appellants.[38]

Relying extensively on *Mailloux v. Kiley*,[39] the court affirmed the lower court's decision that there was no violation of first amendment rights or any right to academic freedom.[40]

A rather novel rationale came from a federal district court in *Wilson v. Chancellor*[41] sustaining a teacher's first amendment claim to have a communist speaker present his political views to the teacher's class. The teacher had invited a Democrat, a Republican, and a member of the John Birch Society to his political science class without objection. Initially, the board had approved of the invitation to a fourth speaker, a member of the Communist Party. After much community criticism, the board reversed its decision and issued an order banning "all political speakers" from the high school.

On one issue, with little discussion, the court was persuaded that the students' constitutional right to hear the speech of others was violated.

Of greater concern to the court was what it considered to be two "pivotal" questions. "First, is a teaching method or vehicle a form of expression protected by the First Amendment? Secondly, if so, is the restriction at issue here reasonable?"[42]

After reviewing precedent decisions in *Keefe*,[43] *Parducci*,[44] and *Sterzing*,[45] the court reasoned:

> These courts also recognized the validity of a popular maxim, "The medium is the message." The expresser's medium can affect the persuasiveness of his message, the duration of its influence, and the size and type of audience which it reaches. The

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[37] Brubaker v. Board of Educ., 502 F.2d 973, 976 (7th Cir. 1974).
[38] *Id.* at 983.
[39] 448 F.2d 1242 (1st Cir. 1971).
[40] Brubaker v. Board of Educ., 502 F.2d 973 (7th Cir. 1974).
[41] 418 F. Supp. 1358 (D. Or. 1976).
[42] *Id.* at 1362.
[43] Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969).
[44] Parducci v. Rutland, 316 F. Supp. 352 (M.D. Ala. 1970).
[45] Sterzing v. Fort Bend Indep. Sch. Dist., 376 F. Supp. 657 (S.D. Tex. 1972).

> act of teaching is a form of expression, and the methods used in teaching are media. Wilson's use of political speakers was his medium for teaching . . . The various school boards which restricted the media employed by Wilson here . . . suppressed expression which the First Amendment protected.[46]

Having determined that the medium is the message, the court then turned to the question of whether the order was reasonable. The court concluded that it was not reasonable. There was no threat of disruption; political subjects were appropriate for the class; and the board was not attempting to ban incompetent speakers. The board's only apparent reason for banning the speakers was to placate angry residents and taxpayers.

The court considered the ban on all political speakers a prior restraint on first amendment expression which could only be sustained if the restraint provides criteria to be followed so that what is restrained and what is not can be known and procedural safeguards for appealing the decision are available.

Additionally, the court rejected the provision banning all political speeches as violative of the equal protection clause. A regulation which allows persons with palatable views to speak and prohibits those with unpalatable ideas from speaking is discriminatory.

> Classification which restrain conduct protected by the First Amendment are unconstitutional unless they suitably further an appropriate governmental interest . . . Appropriate governmental interests include the desire to promote effective education by preventing material disruptions of classroom work, substantial disorders, or invasions of the rights of others, . . . or by averting a clear and present danger.[47]

In another first amendment case,[48] the teaching contract of the chairman of the local chapter of the ACLU was not renewed. The teacher had challenged long-accepted practices, including holding baccalaureate at school and offering prayers at the annual honor society banquet, as violations of the first amendment. He also made a pamphlet, *The Student as Niger*, available to students and wrote a letter to the local newspaper favoring the ACLU position legalizing marijuana. A jury determined that the teacher's nonrenewal resulted from his exercising protected constitutional rights and that the board had attempted to build a record to sustain the charge. Since there was a reasonable basis for the jury's verdict, the circuit court had no reason to set it aside.

A tenured teacher was terminated in Connecticut for "other due and sufficient causes," a statutory charge in Connecticut.[49] Many complaints were received concerning the teacher's classroom conduct and apparent lack of concern for the education or emotions of his pupils. One student was derided in front of his classmates after his parents had made a complaint. The teacher refused to assist students with classwork and, on several occasions, he made comments with sexual connotations to students, embarrassing them before their peers.

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[46] Wilson v. Chancellor, 418 F. Supp. 1358, 1363 (D. Or. 1976).

[47] *Id.* at 1366, 1367.

[48] Wagle v. Murray, 546 F.2d 1329 (9th Cir. 1977).

[49] diLeo v. Greenfield, 541 F.2d 949 (2d Cir. 1976).

The teacher, diLeo, challenged the statute on the basis of "vagueness" and "overbreadth". diLeo's conduct was the subject of a conference held with school administrators prior to his dismissal. After the conference, his conduct continued to worsen. The court reasoned that "[i]n these circumstances, it cannot be said that diLeo did not or should not reasonably have known that such behavior constituted due and sufficient cause for dismissal."[50]

A broad interpretation of the statute allowing discharge for "other due and sufficient cause" might conceivably allow termination for protected first amendment conduct. However, the court, applying the doctrine of *ejusdem generis*, determined that the statute was not "designed to permit dismissal for mere disagreement over educational policy or for conduct that bears no relationship to a teacher's classroom conduct, but rather is limited to conduct reflecting a professional teaching capability."[51]

Freedom of Association

Another first amendment freedom is concerned with an individual's right to associate freely with whom he chooses. However, like other first amendment rights, that freedom is not absolute.

The Eighth Circuit Court of Appeals in *Norbeck v. Davenport Community School District*,[52] rejected a principal's attempt to gain reinstatement. The principal, after acting as chief negotiator for the teachers' association, was charged with unsatisfactory performance, poor judgment, inability to maintain discipline, inability to relate to parents, and inability to follow through on student problems. The court emphasized the need to balance competing interests by stating, "in an educational context, the courts have balanced a teacher's right of association against a state's interest in the orderly administration of a school system. . ."[53]

The court concluded that the district's interest in maintaining an efficient school administration was sufficient to justify the nonrenewal of the principal's contract. The court agreed with the board that the principal's active participation in collective bargaining with his employers on behalf of an association of teachers whom he was hired to supervise, evaluate, and discipline was inappropriate.

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[50] *Id.* at 953.

[51] *Id.* at 954.

[52] 545 F.2d 63 (8th Cir. 1976).

[53] *Id.* at 67.

SUMMARY

Although a board may not terminate a teacher's contract solely because of the teacher's exercise of first amendment rights, if a board has other legitimate reasons for not renewing the contract, it may do so even though the teacher engaged in protected conduct. When teachers appeal dismissals to the courts charging violations of first and fourteenth amendments rights, the court must determine whether the teacher would have lost his job even if he had not engaged in the protected conduct.

Teachers apparently may waive constitutional rights either through a collective bargaining agreement or through a board-adopted grievance procedure. When a teacher has waived these rights, generally, he may not then claim first amendment violations in contesting his dismissal on the basis of the waived rights.

In an educational context, the courts tend to balance teachers' rights, protected by the first and fourteenth amendments, with the state's interest in an orderly disruption-free administration of the school.

If a board has a policy allowing teachers to bring speakers into their classes, the board may not constitutionally prohibit certain speakers merely because it disagrees with what they have to say. There appears to be a renewed interest by the courts in the first amendment right to hear or receive information. However, neither the students' rights to hear nor a teachers's right to select textbooks or other materials is absolute. Both must be weighed against the government's interest in maintaining a proper disruption-free environment in the school.

Clearly, the litigation based on the first and fourteenth amendment claims of teachers has not culminated with the cases presented in this paper. As long as board regulations or board actions restrict teachers' conduct in the school environment or penalize teachers for their conduct, there will continue to be litigation challenging board authority; and, as in the past, when there is disagreement as to liberty interests and first amendment rights, the courts will decide.

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An Analytical Pragmatic Framework for Examining Legal Interests Within the Educational Community

Ronald W. Sealey
Associate Professor
Boston College

In today's society, conflict among people is common. Conflict is the outcome of a disagreement about norms, rules, standards or principles. Out of this disagreement come practical questions like "What should be done?" and "What is the meaningful thing to do?"[1] These questions have one thing in common. They are questions about what act to perform, *i.e.*, about the right thing to do. They are appeals for norms to guide right or meaningful actions.

One place where people look for norms for guiding action is in the law.[2] Norms that contain legal concepts are expected to resolve disagreements among people who adhere to them. One problem of adhering to a norm is that of understanding its meaning. Understanding the meaning of a norm requires the conceptualization[3] of it. In other words, to understand the meaning of a norm is to understand the structure of the concept expressed in the statement[4] of the norm.

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[1] There is a distinction between practical inquiry and theoretical inquiry. Practical inquiry is inquiry about what is the right or correct thing to do. Theoretical inquiry is inquiry about what is true. Ethics is an example of practical inquiry and mathematics is an example of theoretical inquiry.

[2] The term "law" can be used to name a field of inquiry and to name an act. When naming a field of inquiry it names a field of practical inquiry. The question being answered in the practical field of legal inquiry is "What is the legally right or correct thing to do?" The act of doing and not doing the legally cororect thing is a "lawful act" or an "unlawful act." Action is incited to be legal by concepts formed in the field of inquiry named "law."

[3] The term "conceptualization" is not to be taken to mean the same as the term "imagination." The difference between the two terms is the difference between the meaning of "concept" and "imagine." The term "concept" is best taken to mean "language habit." The term "imagine" is best taken to mean "mental picture." Systems analysis can be a culprit here

Decision-making[5] in the public school context requires an ever increasing understanding of legal concepts. For educators to attend to the meaning of the statements of legal norms, they must understand the structure of legal concepts expressed in the statements.

For purposes of clarity and further explanation, this paper will apply the analytical pragmatic structure of a concept to the legal concept of procedural due process. An assumption underpinning the foregoing is that educational practitioners and theoreticians are not familiar with the structure of concepts whether they be legal, moral, or scientific concepts.

Sometimes the structure of a legal concept is mistakenly assumed to be the same as the structure of a scientific or moral concept. This mistake can result in indecision and wrong decisions by educational decision makers. Indecision and wrong decisions also result from relying upon legal institutions' particular interpretative statements of legal norms rather than upon the understanding of the general meaning of statements of legal norms. In either case, what is needed is an understanding of the analytical pragmatic structure of concepts.[6]

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because it disposes one toward using images of flow charts more than concepts formed by definition. For discussion about this distinction, *see* J. McCall, Basic Logic, Ch. 2 New York: Barnes and Noble, Inc., 1952).

[4] A statement is a sentence. A statement of legal norm is a sentence that contains terms that express legal concepts. The norm that fits the context of this paper is "All schools should follow procedural due process." This is normative in that it is a sentence directing someone to do something. It is a legal norm in that it contains the term "procedural due process" which expresses a legal concept.

[5] The term "decision-making" functions ambiguously. Some of the ambiguity can be removed by distinguishing between two kinds of decision-making. There is practical decision-making and theoretical decision-making. There are decisions about what to do and there are decisions about what is true. In J. Cronbach & Suppes, Research For Tomorrow's Schools (New York: The Macmillan Company, 1969), the terms "conclusion-oriented inquiry" and "decision-oriented inquiry" are used. These terms parallel "theoretical inquiry" and "practical inquiry." Another distinction that helps to remove the ambiguity of the concept of decision-making is the distinction between the concepts of choice and decision. By definition, a choice can be irrational or impulsive but a decision must be rational or deliberative. For a discussion on this distinction, *see* W. Taylor, Normative Discourse 36-37 (New Jersey: Prentice Hall, Inc. 1961). This book deals with the logic of practical decision-making, *i.e.*, the logic of practical inquiry or the logic of practical reasoning.

[6] The term "analytical pragmatic" is Elizabeth Steiner Maccia's term. *See* E. S. Maccia, Methodology of Educational Inquiry 18 (Indiana University, rev. 1971) (unpublished manuscript). The term was used by James E. Fisher in J. E. Fisher, Analytical Pragmatics and Its Relevance For Classroom Language Classification (Indiana University, 1971) (unpublished dissertation). In this work he distinguishes between analytical pragmatics and behavioral pragmatics. The concept expressed by "structure" is from Maccia's work. The way it is formed and used in this paper, however, may not be exactly as she would form and use it.

IDENTIFICATION OF A LEGAL INTEREST

Prior to the application of analytical pragmatic structure to a concept such as procedural due process, one must examine the various substantive and adjective laws to identify a legal interest.

To determine if a justiciable case or controversy exists, one must exhaustively examine constitutional, legislative, judicial, and administrative laws to determine whether a legal interest is at issue. Once one has identified such an interest, the next step is to assess the nature of the interest ranging from *de minimus* to fundamental. This process solidifies and operationalizes characteristics of form, purpose, content and function associated with the structure of a legal concept (procedural due process).[7]

FORM OF THE CONCEPT OF PROCEDURAL DUE PROCESS

Concepts are expressed by terms and they are formed by the language act of definition.[8] Literally, definition is the language act of substituting one term for several terms. A definition is a language contract in which people agree to use one term in short for a set of terms. It is in this contractual language act of definition that a concept takes form. The concept is then expressed by a single term that is chosen to be short for the set of terms that form the concept.

Consider the legal term "procedural due process." The term expresses the concept and the definition of the term forms the concept. Usually the form of the concept of procedural due process, *i.e.*, the definition of the term "procedural due process," is not required. Usually the term is just expressed. However, to understand the form of the concept is to understand the definition of the terms that express it.

Consider this definition of procedural due process as the method(s) of asserting allegations and conducting disciplinary, punishment or economic deprivation proceedings fairly and openly, with full opportunity for legal rights and remedies to be made available to the party allegedly adversely affected.[9] Moreover, procedural due process guarantees no particular form of procedure and requires only such notice and hearing as are commensurate with the necessities of a particular case (actual context) and magnitude of the right(s) affected. It is a process of balancing competing interests or rights.[10]

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7. The definition of "structure" used in this paper is the interrelationship of form, purpose, content, and function.

8. For a recent work on definition in education, *see* J. A. Popp, Methodology of Definition In The Science of Education, (Indiana University, 1970). (unpublished dissertation).

9. Reference for this definition of "procedural due process" is Gould v. Looney, 304 N.Y.S. 2d 537, 540, 60 Misc. 2d 973 (Sup. Ct. 1969).

10. *See* Hannah v. Larche, 363 U.S. 420 (1960); Board of Regents v. Roth, 408 U.S. 564 (1972).

In summary, the concept of procedural due process is formed by the combination of the concepts of "method" and "fairness." Terms that express concepts similar to that expressed by the term "method" are "plan" and "design." Terms that express concepts similar to that expressed by the term "fairness" are "honesty" and "impartiality." The concept of procedural due process, then, is a concept formed out of the concepts of planning impartially or designing honestly.

PURPOSE OF THE CONCEPT OF PROCEDURAL DUE PROCESS

The form of the concept of procedural due process is connected with its purpose.[11] The purpose of a legal concept is to designate sanctions or remedies if certain acts are or are not performed and to cause individuals to perform or not to perform certain acts. In summary, the purpose of a legal concept is to designate a punishment or remedy and to cause people to act in a certain way. The purpose of the legal concept of procedural due process is two-fold. It is to designate a punishment or remedy and to incite people to plan or design for impartiality and honesty. Its purpose is not to guarantee against errors of planned partiality and designated dishonesty.[12] As a society matures or realizes the purpose of procedural due process, it accommodates itself to the social need for honesty and impartiality.[13] The intended dynamic purpose of procedural due process fosters, in part, a realization of a moral society.

The purpose of a legal concept compares and contrasts with the purpose of a moral concept. They both have in common the purpose of causing, persuading, directing, or guiding action or acquiescence. They both intend to incite or urge action or acquiescence in schools and elsewhere. The purposes differ, however, in that a legal concept does not have the purpose of appraising or evaluating the acts urged or incited. The purpose of appraising acts is that of a moral concept. The legal concept's purpose, other than to incite action or acquiescence, is to designate or point out punishments or remedies for acts in schools that are not in accord with the action or acquiescence intended by the concept.

The terms commonly used in connection with the purpose of a legal concept are "legal" and "illegal." The terms commonly used in connection with the purpose of a moral concept are "good" and "bad."[14] It is possible for an act in schools to be "bad" as appraised by a moral concept and "legal" as designated by a concept of law.

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[11] For an understanding of the way the concept of purpose is functioning in this paper, *see* Fisher's Analytical Pragmatics, *supra* note 6. For a more general treatment, *see* C. Morris, Signs, Language and Behavior, Ch. V (New Jersey: Prentice Hall, Inc. 1946).

[12] Brown v. Dunne, 409 F.2d 341 (7th Cir. 1969).

[13] U.S. *ex rel.* Hall v. People of the State of Illinois, 329 F.2d 354 (7th Cir. 1964).

The purpose of a scientific concept compares and contrasts with the purpose of a legal concept and the purpose of a moral concept. A scientific concept and a legal concept both intend to designate something; The former description and the latter a remedy and punishment. For example, a scientific concept, such as a concept on the sociology of education, designates how many schools have policies in accord, and not in accord, with the legal concept of procedural due process.

The legal concept of procedural due process intends to incite or urge someone to plan or design for honesty and impartiality. The scientific information or knowledge that many schools are following the concept of procedural due process and many are not is not per se an incitant. People might use the information as knowledge to incite or urge action but this use of knowledge is itself an act in accord with the norm contained in the directive to persuade by knowledge. The assumption is that the use of scientific knowledge for inciting, urging, or persuading action in the schools is in accord with the concept of procedural due process, *i.e.*, to plan or design for honesty; or that rationality ought to be more persuasive than irrationality.[15] Contrast this with a moral concept which intends to appraise or evaluate something as good or bad and to incite or urge actions or acquiescence in accord with what is appraised as good.

CONTENT OF THE CONCEPT OF PROCEDURAL DUE PROCESS

In all of the cases or instances in which actions in school actually are extensions of the form of the concept of procedural due process, the content of the concept is the extension of the acts of planned impartiality or designed honesty.

One way to state the content or extension of the concept is to imagine cases of the concept on a continuum. The continuum can be perceived by arranging a paradigm, model or ideal case of the concept at one pole, a contrary or not so ideal case at the other pole, and a borderline case in between the two poles.[16] The continuum is a means of discerning the content of the concept of procedural due process as an act in the schools for which we have a prior record of judicial resolution.

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[14] For a general treatment on how the terms "good" and "bad" function in a language context and on the logic of practical inquiry or practical decision-making, *see* P. W. Taylor, The Moral Judgment, Ch. V (New Jersey: Prentice Hall, Inc., 1963).

[15] For a discussion on the concept of rationality, *see* Scriven, Primary Philosophy, Ch. II New York: McGraw-Hill Book Company, 1966

[16] For work on inquiry, reasoning, or decision-making using model, borderline and contrary cases of a concept, *see* J. Wilson, Thinking With Concepts, Ch. I (Cambridge University Press, 1971).

When developing the continuum one must first identify the nature of the rights or interests affected and then examine the particularities of the case that are indicative of the judicially determined stardards or criteria. The following cases are predicated upon controversies which arose from an alleged deprivation of procedural due process.

Paradigm Case:[17]

A model case of the concept of procedural due process is one of a tenured teacher[18] or a student who is afforded all of the following: Removal for stipulated cause; majority or two-thirds of all board members in agreement; written charges; a bill of particulars; hearing before board or school appointed committee; notice 20 to 30 days before hearing; a decision rendered eighty days from service of notice plus additional time for continuances; public hearing available at either teacher's, student's, or board's request; right to counsel; opportunity to offer evidence; right to cross-examine witnesses and present defense; transcript of the proceeding; if remediable, reasonable warning given at least 30 days in advance stipulating specific causes.

Borderline Case:

A borderline case of the concept is that of a teacher or a student who is granted four days notice and an administrative hearing, providing a forum for an exchange of ideas between the primary parties.

Contrary Case:

A contrary case of the concept is that of a tenured teacher who is summarily dismissed by a board of education, or that of a student who is summarily expelled from a state college at the suggestion of the state governor, without any procedural safeguards required by due process.[19]

FUNCTION OF THE CONCEPT OF PROCEDURAL DUE PROCESS

The content of this concept is the acts that are extensions of the form of the concept. The continuum discerns some of the content of the concept. It does not distinguish the function of the concept. The function of a concept can be seen by studying the language of school policy. School policy statements are statements of norms for schools made by legally constituted governing bodies and selected individuals. These statements can indicate that the concept of procedural due process is functioning and how it is functioning.

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[17] All cases on the continuum function dynamically as the nature of the legal interest changes.

[18] *See* Mass. Gen. Laws Ann. Ch 71, § 42 (West 1969); Eiden Miller v. Board of Educ. of Community H.S. Dist. No. 505, Bureau County, 26 Ill. App. 2d 90 (App. Ct. 1961).

[19] Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

The concept of procedural due process functions as a process concept. Out of the process, a product emerges. The product is substantive due process. From planning or designing for honesty and impartiality, the moral and legal rights of individuals to life, liberty, and property dynamically emerge. From procedural due process, substantive due process emerges.

MEANING AND THE CONCEPT OF PROCEDURAL DUE PROCESS

Meaning[20] is in the understanding of the structure of a concept. Meaning can be lost if the concept of procedural due process is not viewed as a *functioning* process concept out of which emerges substantive due process; if the *content* of the concept of procedural due process is not discerned by perceiving a continuum of a model case, a borderline case, and a contrary case; if the *form* or *standards* of the concept of procedural due process are not defined in terms of planned or designed fairness, adequate notice, honest, and impartiality; and if the *purpose* of the concept of procedural due process is mistakenly viewed as identical to the purpose of a scientific or moral concept.

Loss of meaning can cause practical inquiry in educational administrative decision-making to go awry. Understanding the analytical pragmatic structure of a concept and applying it to practical inquiry in educational administrative decision-making can prevent this from happening. The structure of form, purpose, content, and function is a framework for practical inquiry by which meaning can be sought and attained in educational administrative decision-making.

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[20] The concept of meaning is discussed in C. K. Goden & I. A. Richard, The Meaning of Meaning (New York: Harcourt, Brace and World, Inc., 1923).

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Understanding School-Based Violence: A Litany of Issues

Robert J. Rubel
Director of Research
Institute for Reduction of Crime
College Park, Maryland

There are two points presented in this paper. First, that writings on or about student crime and violence may be misleading because of certain errors in quantifiable data, such as poor data analysis and/or use of inappropriate study methodologies; and second, that certain related nonquantifiable issues, such as the fear of crime, also confound interpretation of this problem.

Introductory paragraphs to reports in this area often appear straightforward and noncontroversial until subjected to closer scrutiny. Such paragraphs often begin by citing Gallup Poll findings that "discipline" has been the primary public concern respecting education since the early 1970's; that the Senate found tremendous percentage increases in violent student behavior from 1970 to 1973; that communities surrounding schools fear pervasive crimes in those schools; and that the costs of vandalism have become astronomical within the past decade.

Less frequently mentioned, however, are the numerous mitigating factors generally unremembered by readers of such paragraphs. Specifically, polls generally lack concrete examples or substantiated data. If the polled public believes that assaults on teachers have worsened in the last 25 years, can we conclude that more teachers were stabbed in 1977 than in 1952? The fact is that we cannot. There simply are no data to substantiate such a conclusion. With respect to percentage-change data mentioned in the "typical paragraph," it is seldom understood how such data are misleading if readers are not told that a 50 percent increase represents ten incidents or 10,000 incidents. Concerning communities' fear of crimes in schools, it is often overlooked that such fear usually is fueled by a very few dramatic incidents, rather than by the everyday level of unwanted behavior. As for the costs of vandalism, if you adjust for the effects of inflation, the amount of *physical* damage has probably decreased over the last few years.

Whatever the statistical uncertainties may be, and whatever confounding may be introduced through discussion of other social issues, there are certainly many problems involving student violence in public schools. However, these problems may not be exactly what they appear to be. Presentation and analysis of school-based crime statistics has often led to the definition of "problems" that may not exist, and even if they do exist, a sense of reality may be missing. For example, many crimes may be committed with far less intensity than the reader supposes. Assault is assault for reporting purposes, but few assaults would compare well for violence and thrills with fictional television varieties that color a reader's interpretation of that word.

The remainder of this paper, then, is designed to alert those concerned with violence and vandalism in schools to certain complexities and pitfalls that await the uncritical reader of school-crime statistics and reports.

QUANTIFIABLE ISSUES CONFOUNDING INTERPRETATION OF REPORTS

Major Population Trends

During the period from 1950 to 1975 (the latest year for which most of this information is available), the number of secondary schools in this country declined about 3 percent, from 24,524 to 23,837. In the same period, however, the number of students in grades 9-12 increased 134 percent from 6.1 million to 14.9 million. So, from 1950 to 1975, the average secondary school building must have grown larger to house a population that more than doubled during the period. Besides, classrooms became more crowded as both total population and student attendance increased faster than new construction. The period ended with larger schools and more crowded classrooms.

These changes relate to an important point. There are many theories proposing that increased student density in classrooms and in schools, plus increased school size, produces a "critical mass" leading to unruly behavior. The assumption underlying such theories is that ten disruptive students affect the school environment quite differently than would 100 disruptive students. This fact was quickly discovered by many college and university administrators during the troubled 1960's.

A further point that is an outgrowth of larger schools and greater absolute numbers of unruly pupils is that as schools become larger, the span of an administrator's control is stretched thin. The administrator that could handle the "normal" disruptions in a group of 500 students found himself embattled by the "normal" disruptions among 3,500 students. This is so, even when *rates* of disruptions and misbehaviors remain constant between the smaller and larger schools.

At some point, a "critical mass" relating to the size and density of student populations is reached. This critical mass is the point at which the sheer number of unruly students defeats the ability of teachers and administrators to retain control. Administrators, who are unprepared by experience, are willing to try almost anything that they think will help in this situation. Looking back, it was during the 1960's that this critical mass point was reached in school after school across the country. It was at this time that a host of temporary expedients were implemented that are *now* seen to have chiefly addressed *symptoms* rather than *causes*. Some of the expedients, such as a loosening of graduation requirements, now appear to be contributing to a worsening of the problem of unruliness itself.

Suppose that the "critical mass" theory has no validity, and that neither the size of student bodies nor the density of schools had changed from 1950 to 1975, would disruption and crime have grown anyway? Perhaps, for during that period, the FBI statistics show that juveniles from 15-17 years of age were arrested far more often in 1976 than in 1953 for so called "Part I" offenses (murder, rape, aggravated assault, robbery, burglary, larceny-theft, and auto theft). In 1953, the arrest rate was 89 per 100,000 15-17-year-olds. In 1976, the rate had increased to 292 per 100,000 15-17-year-olds. This is a 228 percent increase. Why this increase? Have there been more arrests in relation to the "real" crime rate, changes in reporting methods, or a real growth in crime? Since we really can't answer these questions, we cannot say for sure, as is often and justly said, that our schools have only reflected a growing lawlessness within this age group.

Confusion in Research or Analysis Phases

As mentioned in the introduction, publication of reports and studies containing errors in research and/or analysis have added to the difficulty of understanding this field of study. Although a number of these errors are of little interest to other than government and academic researchers who fight over these topics, a select few are general and important enough to deserve some mention in this paper. These particularly important areas concern problems with data development and definitions; controlling for dollar-value variables; and difficulties at the methodological stage.

Data Development and Definitions

In this category, two problem areas stand out: the development of cost-of-crime data; and problems resulting from nonuniform definitions.

Cost-of-crime data that are frequently represented are often misleading. In 1973, for example, Kenneth Dukiet wrote that the cost of crimes committed by students against schools was $260 million, and that the cost of security offices was $240 million.[1] *U.S. News and World*

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[1] *Dukiet, Spotlight on School Security*, School Management 16-18 (November/December 1973).

Report added these figures together in an article colorfully titled *Vandalism—A Billion Dollars a Year and Getting Worse.*[2] During the same year, the Educational Research Service, Inc., of Arlington, Virginia calculated the cost of crimes committed against schools nationally at $82 million.[3]

In 1975, *School Product News* did its annual calculation of costs of crimes in schools and set the figure at $100 million.[4] That same year, the National Association of School Security Directors, in Senate testimony, estimated that the cost of crime totalled about $594 million.[5]

In this country, spectacular figures get more publicity and this case was no exception. Dukiet's figures, based only on 25 phone calls to unspecified individuals in unspecified school districts, won national circulation, while the Educational Research Service's findings, based on stratified random probability samples, remained buried. Likewise, the Senate, and ultimately almost everyone else, adopted the National Association of School Security Directors' (NASSD) estimate of $594 million as the cost of crime, while other publications and researchers were suggesting a figure as little as one-sixth as large.

The point here, however, is not that one figure is "right" while another is "wrong," but that the figures represent different things depending upon how they were evolved.[6] Conclusions, in other words, must be examined in light of the foundations upon which the facts were developed.

Non-uniform definitions of common offenses leads to a second major area of complication. Terms such as "assault" or "vandalism" often mean different things to different people. An elementary school teacher who complains of being "assaulted" by a third-grade pupil may mean something quite different from what is meant by a high school teacher who registers the same complaint about an eleventh-grade student. Other important examples of potential confusion over definitions follow.

Fires may result from malicious burning (arson), an accident (electrical short), or an unknown cause. The actual cataloging of individual acts, however, may not be so precise. For instance, is a trash-can fire listed under arson, vandalism, or miscellaneous? If there is a night burglary that involves a fire, is the loss categorized as part of the burglary incident or is it listed as the result of a separate act of arson? What about the case of a chemistry or home economics room that is damaged by in-class error resulting in fire? Is it described as "just burned up" or is it called "fire" or "miscellaneous"? The definitions affect the school district's fire profile and may affect insurance premiums and public relations. As a consequence of the ramifications of the definitions of such an act, some school districts may use one definition of "fire," while other districts use another.

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[2] U.S. News and World Report, *Vandalism—A Billion Dollars a Year and Getting Worse*, June 24, 1974, at 39.

[3] Educational Research Service, Inc., Losses Due to Vandalism, Arson, and Theft in Public School Systems, 1972-1973 (Arlington, Va.: Educational Research Service, Inc., 1973).

[4] School Product News, *School Security Survey*, June, 1975, at 10.

[5] Grealy, *Nature and Extent of School Violence and Vandalism; Testimony Before the U.S. Senate Subcommittee to Investigate Juvenile Delinquency*, The School Security Journal 51 (May 1975).

[6] While the NASSD figure suffered from sample bias that inflated the extrapolated totals to produce a falsely large figure, the *School Product News*' study only received a 15 percent return rate (probably due to the time of the year it was sent out) that ultimately underplayed the extent of this problem.

Vandalism, strictly defined, only encompasses "malicious damage." Many studies, however, also lump fire and burglary losses under the heading of "vandalism." This particular confusion is amplified when people try to develop "cost of vandalism" estimates for the cost totals vary widely, primarily as a function of including such high-cost items as "fires" in some studies while not including them in others.

As is evident from these examples, multiple interpretations of the definitions of crime categories can be very confusing, even within one school or school district. When the data are aggregated nationally, these weaknesses of multiple interpretation severely confound the overall picture of the problem.

Controlling for Dollar-Value Variables

Frequently, studies suggest a relationship between increased incidents of crime and increases in the costs of the resulting damage. Frequently, too, these studies wholly overlook the effects of *inflation* or the increased *value of school property* on such damage costs. Either or both of these factors may inflate the appearance of the problem independently of changes in the absolute levels of destructive incidents.

As mentioned, many articles purporting to show crime-cost changes in schools fail to account for the general effects of inflation on *all* prices. For example, an item costing $100 in 1950 would cost $224 in 1975. A pane of glass costing $3.00 in 1967 would cost $4.48 in 1975 (quite independent of increases in labor costs!) Some changes, therefore, are to be expected solely because of inflation, and independent of an increase in actual incidents of crime. What is important in terms of analyzing the problem, however, is the extent to which *observed change exceeds the rate of inflation*. (Parenthetically,the overriding caution here is that the quality of information coming from school districts is usually not uniform enough to withstand this level of analysis. At best, this discussion provides readers with a sense of the caution that must be exercised when studying this field.)

The following case analysis is true and exemplifies the effect that inflation can have on data interpretation. The cost of all offense-types for the

Boston Public School system was set at $535,000 in 1967[7] and $1,000,000 in 1975.[8] Using the Consumer Price Index (CPI), the 1975 figure of $1 million is seen to represent only $620,000 in 1967-constant dollars. This is an absolute increase of 16 percent in eight years, or an average increase of 2 percent per year. In addition, however, the $1 million raw figure is overstated because it includes the cost of one $300,000 fire that resulted in the closing and non-replacement of a school. Removing this extraordinary expense, the $1 million shrinks to $700,000. Using the CPI on the $700,000 figure, the adjusted 1975 cost of non-extraordinary crime in Boston's schools becomes $434,000. This represents a DECREASE of 19 percent from the 1967 figure, a 2.4 percent average decrease in each of eight years.

This example illustrates that simple comparisons of changes in the scope of acts against schools cannot be made without careful analysis and detailed factual information. In this particular example, the effects of inflation made Boston's problem appear much worse than it was in reality. When the effects of inflation were mathematically controlled, and other pertinent information was included, Boston's school crime costs were less than half of what they were initially thought to be.

Generally speaking, in analyzing historical data over the past 25 years, the effects of inflation have not always been a concern. In the 1950's, inflation had only a nominal effect on cost-data. In the 1960's, the impact of inflation was growing stronger, and by the 1970's, its effects was widespread and pervasive. The need to use the Consumer Price Index depends upon the period under study. Studies of the 1970's, however, should not be made without the use of the CPI.

Concurrent with a discussion of the effects of inflation, the value of school property *susceptible to damage* must be considered. Over the past 25 years, increasingly expensive audio-visual equipment, teaching machines, and other technological advances have been introduced into the classroom. Whereas chalk and chalkboards were *the* standard instructional tools of the 1950's, electric typewriters, calculators, computers, and sophisticated laboratory supplies now supplement that chalk. As a consequence, there is more property of greater value susceptible to theft.[9]

This trend toward greater concentration of high-value property and facilities in schools is illustrated by statistics available through HEW's National Center for Education Statistics (NCES). In 1950, the value of all school property was placed by NCES at $13.4 billion. In 1975, the value had increased to $102.1 billion. Using the Consumer Price Index, and adjusting the 1975 figure to represent *replacement value in terms of 1950-constant dollars*, we see that it would take $97.7 billion 1950-dollars to replace all school property and facilities in 1975. This is an absolute increase of 727 percent in a 25 year period, an average increase of 29 percent per year.

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[7] H. C. Olson & Jr. B. Carpenter, A Survey of Techniques to Reduce Vandalism and Delinquency in Schools (Washington, D.C.: National Technical Information Service, U.S. Department of Commerce, 1971).

[8] Personal communications with Anthony L. Galeota, Chief Structural Engineer, Department of Planning and Engineering (Sept. 1976).

[9] Most of the organized theft, involving whole rooms of equipment, is committed by adult thieves at night.

In summary, it is necessary to consider two issues with respect to the costs of crime in schools. First, the effects of inflation on estimating costs, and second, the value of all school property within the local or national jurisdiction under study. Only when these two factors are taken into consideration can meaningful conclusions be drawn about changing trends in the costs of school-based crime and vandalism.

Difficulties at the Methodological Stage

Perhaps the single most common methodological error involved in the study of student offenses is the failure to compile rate-of-occurrence figures. Most commonly, a percentage-of-change is substituted. Although this factor may not appear interesting or important to non-researchers, the following example may demonstrate the dangers inherent in findings which do not incorporate *rate* data. This example is wholly hypothetical, but not uncommon in genre.

> Telex News Service, Nov. 3, 1976 . . . Baltimore schools were cited by the XYZ Corp. as having the highest number of assaults among 100 studied cities. Baltimore had 300 serious assaults, as compared to the lowest-ranked Ault, Colorado, which only had 50 assaults for the same time period. Crimes in schools, which have been getting worse . . .

To return to the "real" from the "unreal," Baltimore schools had a 1975 enrollment population of 166,000 pupils but Ault had only 948 pupils. If you develop ASSAULT RATES for the hypothetical example cited above, Baltimore has the low assault rate of 1.8 assaults per 1,000 pupils, whereas Ault has a rate of 52.8 assaults per 1,000 pupils. Obviously, conclusions based on calculations failing to reflect *rates of occurrence* will be misleading.

As mentioned above, percent-change calculations have commonly been used in place of rate calculations. Apart from the analytical advantages provided by rate figures, percent-change numbers have the added disadvantage of underemphasizing large-population items (student-student assaults, vandalism, cost of crime) and overemphasizing small-populations items (murder, student-teacher assaults, rape, arson). The following example demonstrates this phenomenon:

> A change from 200 to 300 incidents is a 50 percent change, but involves only 100 incidents. A change from 10,000 to 15,000 incidents is also a 50 percent change, but involves 5,000 incidents.

To say that student homicides increased 150 percent while vandalism increased only 80 percent would badly distort the picture of the types of problems faced by schools under study. This is so because the incidents of in-school murders taking place nationally will number only in the dozens, whereas vandalism cases will number in the hundreds of thousands.

Caution must be exercised, then, when only percent-change data are presented in support of a particular conclusion. If, however, the percent-change data are accompanied by the raw numbers from which they were calculated, then readers can determine both absolute and relative changes. In such cases, objections to using percent-change calculations would be withdrawn.

Lack of Important Information

Time and space do not allow for a thorough listing of all of the information missing from the raw data collected within schools from which school crime-profiles are developed. At this point, only two major topics concerning the lack of information are presented. The first focuses on the seriousness of an event, and the second focuses on the intent of the act.

Assessing Seriousness of Offenses

Since offense data are aggregated when they appear either in school district or national summary reports, readers have no clue as to what proportion of the total incidents were serious or were insignificant. Further, knowledge of the seriousness of offenses is very important information that should be obtained before trying to plan student crime-intervention programs. Clearly, a school in which there were 50 assaults with no injuries within one month is different from a school in which there were only 10 assaults, but three resulted in permanent disfigurement and the others produced injuries requiring hospitalization. Due to the difficulty in assessing the relative seriousness of offenses in aggregate data, and because such "seriousness scaling" is seldom done, users of incident-report information originating in schools are cautioned about making unfounded infrence respecting the relative intensity of school-based violence.

Differentiating Intent of Acts

Present data collection efforts related to school-based violence do not differentiate between malicious damage and accidental damage. For example, there is currently no way to determine whether vandalism statistics include or exclude accidentally broken windows. This problem is exacerbated because school districts are frequently motivated by their own need to ascribe loss to malicious purposes for the sake of insurance repayments.

As it applies here, the most troubling difficulty with using aggregated offense data is that they invariably overemphasize the occurrence of malicious acts through the inclusion of accidental acts. Reduced to an entry in an incident roster, the fire either did or did not occur. The statistic is not conscious and does not care if the fire was intentionally started as a diversion for an illegal entry attempt, or resulted from a trash-can fire that began as a prank. To the extent that policymakers are concerned with accurately identifying changes in the nature or extent of student crimes in schools, the issue of *intent* is crucial. (Parenthetically, the process from the *occurrence of an incident* to the *report of that incident* varies enormously within and between school districts. Further, such variations are largely matters of local school district policy.)

RELATED NON-QUANTIFIABLE ISSUES CONFOUNDING INTERPRETATION OF REPORTS

Up to this point we have discussed methodological and statistical types of problems that exist in studies and reports. In this section, more substantive areas affecting school-based crime and violence are discussed. Since each of these single topics could be developed into lengthy papers, discussions presented here are only meant to provide an outlines of the principal points of concern.

Changes in the Perception of Student Offenses

Two factors evolved during the 1950-1977 period that bear on our understanding of student violence and vandalism in schools. First, nearly everywhere, during the late 1960's, schools established security offices to deal with rising student misconduct; and second, the public and school officials nearly everywhere have come to expect violence in the schools and see it as a "normal" part of public school life. These two factors are discussed in more detail below.

Offices of School Security

The late 1960's and the early 1970's saw the formation of the bulk of urban school security offices.[10] The school security offices originally had two tasks. First, they were responsible for spearheading the school district's responses to group disruptions with little or no concern for individual cases; and second, they evolved systems of property protection for schools requiring them. As student disruptions became less frequent, school security offices shifted their focus to crimes against property. By the mid-1970's, "school security" had become an emerging profession. The National Association of School Security Directors (NASSD), formed in 1969, hd about 300 members by 1975. As the NASSD was developing, however, its members recognized that their single most crippling problem was that information about the nature and extent of student offenses committed in schools was largely unknown. The NASSD members realized that data gathered in different school districts resulted from different reporting methods and no national profile could be developed. Even more annoying was the fact that specific offense categories, such as arson, vandalism, or assault, were differently defined in different school jurisdictions. In its 1973 conference, the NASSD determined to establish a national reporting format, and to lobby for Congress to look more deeply into this problem.

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[10] Some cities, such as Seattle, New York, Chicago, and Los Angeles, had officials performing this function before this period. During this time period, however, the number of school districts establishing security offices became extensive.

Over the next few years, aided in part by the NASSD directives adopted at the 1973 conference, the following major events occurred:

In late 1973, the NASSD began work on a form that could be used to make national comparisons of information from different school districts. The form now exists, but was never adopted by the school districts;

In 1974, the Senate Subcommittee to Investigate Juvenile Delinquency sent out a questionnaire asking security directors to compare offenses committed in 1970 with those committed in 1973;

In August, 1974, Congress instructed HEW to describe accurately the nature and extent of school-based crime and violence through a "Sage School Study;"

In April, 1975, the Senate Juvenile Delinquency Subcommittee held three days of hearings on the nature and extent of violence in schools.

A consideration, sometimes neglected, that must be kept firmly in mind when reading studies or reports in this area, is that one generally cannot make direct and meaningful comparisons between pre-1973 and post-1973 data on school-based offenses. There is simply much more data available for the post-1973 period. The earlier data is so comparatively fragmented that direct comparisons are almost certain to be misleading.

An added effect of *security office reporting* on the profile of student offenses is that it may cause the appearance, over time, of a shift in the types of offenses committed by students. Traditionally, there has been a high ratio of property to personal crimes. Property crimes are far more frequent. Property crimes are also much more easily controlled for they are subject to reduction through security technology. Target-hardening through better locks, bigger fences, and intrusion detection systems is usually quite effective in deterring this type of crime. Crimes against persons are not so easily deterred for they usually occur as the opportunity presents itself. Spontaneity is the key word with respect to personal crimes.

In cities where security offices have existed long enough to have established property-protection programs, crimes against persons are likely to stand out as considerably more evident than in school districts without such programs. This phenomenon relates to a topic to be discussed concerning the fact that a community's perception of its schools is most affected by publicity surrounding spectacular offenses. Most spectacular offenses are those that occur against persons. In districts where security programs have largely removed the property-crime problem, there will APPEAR to be greater numbers of crimes against persons. The author of this paper submits that it may not be the case that absolute numbers of offenses have increased. The alternative situation is that with the attenuation of property crimes, public attention focuses on personal crimes. Clearly, this affects crime-profile data for schools, school districts, or schools aggregated in a national sample.

Institutionalization of Violence

A certain institutionalization of violence within schools accompanied the formation of offices of school security. Beginning in the late 1960's, local school administrators began to see a relationship between criminal acts in society and in the schools. A logic-chain was developed. Vastly simplified, it observed that: *schools reflect society; there is crime in society; police handle crimes in society; security officers have been hired to handle crimes in schools.* Administrators and security officers were increasingly forced to confront the fact that they had only limited powers at their disposal for dealing with school-based offenses. The school was no longer comparatively sacrosanct. It, like the streets around it, increasingly became both the stage and the battleground for acts of juvenile crime and violence.

In the 1970's, problems with student discipline continued to increase. By the mid-1970's, fear of violent student acts had caused public awareness to shift from common, everyday acts and focus on unusually violent acts. This shift of attention has caused the public to accept a level of contralegal behavior in schools that would not have been tolerated twenty years ago. An institutionalization of crime has taken place.

We might ask ourselves, why school crime today, and for the past several years, has not diminished. How can we account for the fact that it is still with us and is almost an institutionalized aspect of everyday school life even though the number of school security offices have greatly increased over the years? Does this mean that security offices are ineffective? Does it mean that without them crime and violence would be far greater than it is today? Does it mean that we are now witnessing a modern version of "cops and robbers" with today's crime and violence an appropriate student response to the security measures themselves? Such questions, surface in many discussions related to this field. Policymakers must take positions with respect to such questions before deciding on remediating approaches within schools.

Changes in Administrative Handling of Unruly Youths

Over the past 25 years, administrative procedures for handling student behavior problems have undergone extensive changes. These changes affect ways in which we interpret trends in school violence.

In the 1950's, schools simply expelled or suspended pupils exhibiting unwanted behavior, whereas in the 1970's, students are much more frequently retained by the schools. This can be demonstrated by looking at the high school dropout rates for this period. In 1950, the dropout rate was 37 percent; in 1960, it was 31 percent; and in 1976, it was about 25 percent. This increased student retention may not be due to a more exciting curricula as much as it is due to the increased difficulty the schools have in suspending students who are not *obviously a danger* to the school or to other persons.

As a result of *In re Gault*[11] (stating that juveniles had rights under the Constitution), *Tinker v. Des Moines Independent School District*[12] (finding that a student's rights extended into schools), and *Goss v. Lopez*[13] (ruling that procedural due process must be followed by schools for issues of student suspensions), administrators found that increased limits had been placed on their abilities to suspend or expel pupils.[14] Although pupils could still be suspended or expelled, greater care had to be exercised in the procedures followed in such cases. Misbehavior, not clearly serious enough to withstand close scrutiny as a "suspendable offense," was referred back to teachers. Teachers, thus, had to increase their tolerance for unwanted classroom behavior.

As a result of this greater in-class retention of unmanageable but unsuspendable pupils, an increased amount of unwanted behavior is in evidence throughout the school. This, in turn, affects the interpretation of school-based crime and violence data because of qualitative difference between the schools of the early 1950's and the schools of the mid-1970's with respect to retained pupils exhibiting unwanted behavior.

Fear of Crime and Violence

Closely affiliated with the preceeding discussion about the general increase in unwanted behavior throughout the schools, is the impact of such unwanted behavior on the overall education environment through the mechanism of *fear*. The most important point to remember when discussing fear of crime is that such fear may exist *independently* of actual criminal acts. A few dramatic incidents achieving widespread publicity will have a greater impact on a community than will pervasive, common, minor incidents affecting students every day.

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[11] 387 U.S. 1 (1967).

[12] 393 U.S. 504 (1969).

[13] 419 U.S. 565 (1975).

[14] For a thorough, straightforward overview of these and other cases with respect to implications for schools and students, *see* R. J. Rubel, The Unruly School: Disorders, Disruptions, and Crimes, Ch. IV (Lexington, Mass.: D.C. Heath & Co., 1977).

Interestingly, the fear of crime issue has two opposite effects on the school-based crime profile. Outsiders looking at the school develop a distorted view of extreme violence as an everyday occurrence, whereas students, fearing more serious repercussions, willingly give in to extortion networks. The resulting crime profiled depicts many schools, especially urban schools, as battlegrounds in war zones, with the extortion networks and drug distribution network relatively low-level and unimportant. It is the author's opinion that it is exactly this everyday existence of contra-legal drug and extortion networks that most seriously affects the quality of education in schools because these networks underscore the weakness of local school administrators in controlling problems within the schools.

Considering the fact that it is the dramatic crimes that are reported and that cause the community to formulate much of its opinion, it is little wonder that these are the crimes that are targeted for attention by security offices and administrators alike. Dramatic incidents, however, are newsworthy because they are infrequent. Readers are cautioned to go beyond such spectacular offenses as rape and homicide when developing school-crime profiles. Investigations into the pervasiveness of contra-legal distribution and extortion networks will profoundly affect study conclusion.

SUMMARY AND CONCLUSIONS

The following picture can be drawn from what has been stated. First, as the youth population peaked in the mid-1970's, schools became larger and classrooms became more crowded. Second, as the individual school population grew, the sheer numbers of youths exhibiting unwanted behavior outstripped administrators' abilities to maintain control in a traditional sense. Third, offices of school security were formed in the early 1970's to assist administrators in maintaining control of their schools. Fourth, even while security offices were formed, court rulings were, in effect, forcing schools to retain increasing numbers of pupils exhibiting behavior that previously would have been grounds for dismissal. Fifth, with the formation of security offices, school-based offenses were reported with a consistency and thoroughness previously unknown. Sixth, a tangle of research and analysis errors plague existing data so that clear visions of "actual" problems are not forthcoming. Seventh, a certain amount of student crime and violence has come to be expected in schools today. Eighth, in cities where security offices have been in effect for a few years, the ratio between property and personal crimes may begin to be reduced. This causes personal crimes to *appear* to increase simply because they become more visible as property crime decrease in numbers.

It is issues such as these, then, that surround the phenomenon of violence in schools and require persons concerned with this subject to take a critical look at the overall problem of student crime and violence before planning prevention or reduction programs, or evaluating such programs.

In conclusion, the author urges caution in the use of data gathered from schools—especially data not subjected to some of the "cleaning treatments" discussed in this paper. Further, the author urges additional research to determine the extent to which problems of student violence exist independent of the confounding variables discussed in this paper.